HAWKFLIGHT ENTERPRISES (PVT) LTD

VS

JANE MAWURUKIRA

IN THE HIGH COURT OF ZIMBABWE
MUTEVEDZI & CHIVAYO JJ
BULAWAYO, 4 APRIL 2025

Civil Appeal

T. Dube, for the appellant.
V. Majoko, for the respondent

MUTEVEDZI J: This appeal is against the whole judgment of the Magistrates Court sitting at Bulawayo, handed down on 2 May 2023, dismissing the appellant's claim for the cancellation of an agreement of sale, the conversion of the deposit and part payments made by the respondent to become rentals and the ejectment of the respondent and all those claiming occupation through her from Stand No. 339 Emthunzini Township, Bulawayo and costs of suit. We must state upfront, that at about the same time that we heard this appeal, we also dealt with another in the case of *Lloyd Sesa v Hawkflight Enterprises (Pvt) Ltd T/A Hawkflight Construction* HB-47-25, *(Lloyd Sesa)* in which the legal issues were on all fours with this one. The two cases had been dealt with by the same magistrate *a quo* who in strange and inexplicable circumstances had arrived at divergent determinations. In the first case, he gave judgment for *Hawkflight Investments* but in the second the decision went against it. In *Lloyd Sesa*, we dismissed the appeal and held that *Hawkflight Investments* was entitled to cancel the agreement of sale and the ancillary remedies it sought. We do not intend in this case, to fall and into the same trap as the magistrate did and upset our own decision. We will therefore replicate and largely depend on our legal findings in *Lloyd Sesa* for our decision in this case. Had it been possible, we could have simply delivered a single judgment covering both cases.

BACKGROUND

[1] The appellant is a duly incorporated company in terms of the laws of Zimbabwe and is into the business of constructing houses for sale whilst the respondent, is a female adult who like so many other Zimbabweans must have been excited to own a home of her own. The parties entered into an agreement of sale through which the respondent purchased an immovable property known as Stand number 339 Emthunzini Township, Bulawayo from the appellant. The interests of the appellant lie in that same stand number 339 Emthunzini Township, Bulawayo, which it sold to the respondent. As already said, it claimed in the court *a quo*, for cancellation of the agreement of sale, the ejectment of the respondent and all those claiming occupation through her from Stand number 339 Emthunzini Township, as well as the forfeiture of the moneys which the respondent had paid. Needless to state, the claim was dismissed by the court *a quo*.

[2] The agreement of sale referred to above, was concluded on 3 May 2011. The essential terms were that the purchase price of the immovable property was pegged at US$ 33 120.00. The respondent deposited a sum of US$1 040.00 upon signing of the agreement of sale. In addition, she was supposed to pay monthly instalments of US$267.20. The instalments were due on the first day of each succeeding month over a period of two years to liquidate the balance. In breach of the agreement of sale, the respondent fell into arrears amounting to US$ 22 950.00. In line with the terms of their agreement of sale which specifically indicated that the appellant was entitled to cancel the agreement in cases of breach, the appellant who was the plaintiff in the court aquo, issued summons on 12 February 2019 against the respondent (defendant in the court *a quo*). The respondent defended the action. The parties exchanged pleadings. In a joint minute, at pretrial conference stage they agreed that their issues for trial were as follows:

1. Issues

1.1. Whether or not the Plaintiff is entitled to cancel the contract and evict the Defendant.
1.2. Whether at the time Plaintiff issued summons the defendant was in arrears with instalments on the purchase price of Stand No. 339 Emthunzini Township, Bulawayo and if so, in what amount?
1.3. Whether after February 2019 the Plaintiff refused to accept instalments in any other currency other than United States dollars?
1.4. Assuming that the defendant was in arrears in instalments, whether the provisions of the contractual Penalties Act regarding notice to be given to a defaulting purchaser were complied with by the Plaintiff.
1.5. Whether assuming the Plaintiff was entitled to cancel the agreement of sale, the penalty of forfeiture of the deposit paid and all instalments paid was a fair penalty.

Proceedings in the court *a quo*

Plaintiff's case (Appellant)

[3] In support of its case, the appellant called its official Martin Moyo to testify. He was the appellant's Operations Manager. His authority to represent the appellant was never in issue. He said in May 2011, the respondent approached the appellant with the intention to purchase stand no. 339 Emthunzini Township measuring 375m^2 on a rent to buy scheme and the parties entered into the agreement referred to above. The property was a built up a house. The respondent paid a deposit of US$1 040. Thereafter, the respondent was required to pay monthly instalments of US$250 and US$17 for insurance. He added that at the time of signing the agreement, the appellant had no title over the property. Instead the registered owner of the property was Glastonbury Dairy Produce (Pvt) Ltd. He further stated that the respondent failed to comply with the payment of instalments and fell into arrears amounting to US$22 950. It was a material term of the agreement that in the event the respondent breached the terms and conditions by failing to meet his obligations, the appellant would cancel the agreement of sale and repossess the house. When the breach occurred, the appellant gave the respondent a seven-day ultimatum to remedy the breach. The respondent did not take any step to address the issue.

[4] Under cross examination, he said the appellant had not sold land to respondent because it did not have title to it. Instead, the appellant said it sold its rights and interests in the property in question to the respondent. He said a subdivision permit had been issued to Glastonbury Dairy, which held title to the land, in 2010. Martin Moyo denied that the appellant had refused to accept local currency from the respondent as payment of instalments. He further explained that the respondent was paying through them until she fell into arrears and the contract was cancelled. The respondent then made payments through a third party. He was adamant that the respondent was served with a notice to rectify breach and that the appellant did not receive any instalments from Messrs Mangwana and Partners' Trust Account on behalf of the respondent.

Respondent's case (Defendant)

[5] The respondent gave evidence to support her case. Her evidence was that she purchased stand no. 339 Emthunzini Township from the appellant at US$33 120. She admitted that the terms of payment were as outlined above. She admitted that at the time of issuance of summons

she had only paid US$4 900. When the appellant wrote to her to rectify the breach, she had attempted in vain to make payments because the appellant had refused to accept it. That prompted her to make payments to Mangwana and partners Trust Account amounting to $28 320 in local currency. She alleged that the same amount was credited to Hawkflight. She further argued that her house and those of other purchasers had been built without a valid subdivision permit as shown by the fact that the appellant had only bought the land from Glastonbury Dairy on 25 July 2022. She concluded by saying that the appellant could not cancel the agreement because it had given her only seven days' notice whilst others had been afforded thirty days' notice days' notice.

[6] Under cross examination, the respondent conceded that she had fallen into arrears to the amount stated by the appellant resulting in the appellant issuing the notice for her to remedy the breach and ultimately suing summons for the cancellation of the agreement.

Findings of the court *a quo*

[7] The court *a quo* found that the appellant had entered into an agreement of sale with the respondent without obtaining a subdivision permit. It said it therefore had no jurisdiction to grant the appellant relief to enforce a contract which was prohibited by statute. In that regard the court *a quo* referred to section 39 of the Regional, Town and Country Planning [Chapter 29.12] which provides that:

> "**39 No subdivision or consolidation without permit**
> *(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)* For the lease of any portion of a property for a period of ten years or more for the lifetime of the lessee;
> *(iii)* Conferring on any person a right to occupy any portion of a property for a period of ten years or more or for his lifetime; or
> *(iv)* For the renewal of the lease of, or right to occupy, any portion of a property where the aggregate period of such lease or right to occupy, including the period of renewal, is ten years or more; or
> (c) consolidate two or more properties into one property; except in accordance with a permit granted in terms of section forty:

Having satisfied itself that the agreement was illegal for want of a subdivision permit, the court *a quo* dismissed the appellant's claim.

Proceedings before this court

[8] Dissatisfied with that outcome, the appellant appealed the decision to this Court on the following grounds:

> "**GROUNDS OF APPEAL**
> **1.** The court *a quo* erred is dismissing the Appellant's claim on the basis of a point of law that was neither pleaded by the Respondent no identified as an issue for trial and thereby causing prejudice to the Appellant.
> **2.** The court *a quo's* finding that the appellant was only issued with a subdivision permit in 2023 was grossly unreasonable and irrational since the number being BYO/METRO/04/10 pointed clearly that the initial permit was issued in 2010 before the parties signed the written contract of sale.
> Alternatively,
> **3.** Having found that the contract of sale between the parties was illegal, the court *a quo* erred in failing to exercise its discretion to relax the in *pari delicto* rule to prevent an injustice against the Appellant since the respondent remains in occupation of a property that she failed to purchase.
> **WHEREFORE** the Appellants prays for the following relief;
> (a) That the appeal succeeds with costs.
> (b) That the judgment of the court *a quo* be set aside and thus the matter be remitted to the court the court *a quo* for the same Magistrate who dealt with the case to determine the substantive issues on the merits that he did not decide."

Issues for determination

[9] This appeal, turns on two very narrow issues. That is whether or not:

i. the court aquo erred in dismissing the matter on a point of law which was not pleaded; and

ii. at the time of agreement of sale, there was a subdivision permit.

In our view, the second issue is capable of disposing this appeal without the need to examine the second. The basis of the court *a quo's* decision was that the agreement of sale was illegal for want of compliance with the provisions of s 39 of the Regional, Town and Country Planning Act [Chapter 29;12] (the Act). Much as the appellant submitted during the hearing and in its heads of argument that the agreement was not a sale of land but one in which it sold its rights and interests in the property, the long and short of it is that if the court determines that there was a subdivision permit before the agreement was entered into,

he means the matter must end there. The finding of the court *a quo* would be wrong in the circumstances.

The Law

The subdivision permit

[10] Clearly, the issue that there was no subdivision permit when the agreement of sale was entered into was not pleaded in the court *a quo* but it was raised in the midst of the trial and the parties attempted to deal with it. It is the major point of disputation in this appeal. The matter, therefore, depends on whether or not there was a subdivision permit.

[11] It is settled law in this jurisdiction that a party can raise a point of law even for the first time on appeal on condition the point of law was raised as an issue in the grounds of appeal or in the heads of argument and that the determination of the point of law must not prejudice the other party. In the case of *Zimasco Private Limited v Maynard Farai Marikano* SC-6-14 at p.9 of the cyclostyled judgment, it was held that: -

> "It is settled law that a question of law can be raised at any time, even for the first time on appeal, as long as the point is covered in the pleadings and its consideration involves no unfairness to the party against whom it is directed."

[12] From the testimonies of the parties, the majority of the issues appear common cause. For instance, it is admitted that the respondent had fallen into arrears in the sum of US$22 950. She was in breach. The agreement of sale provided for the cancellation of the contract in case of breach. It must follow that if the contract was legal, the appellant reserved the right to seek the cancellation of the same like it did.

[13] The question whether or not the parties' agreement was valid for want of compliance with the provisions of s 39 of the Act is a question of law. However, the question whether or not **the permit existed** can only be a question of fact. The appellant said the permit had always been there whilst the respondent argued that there

was none. Both parties extensively dealt with the issue in their heads of argument. The appellant contended that the subdivision permit was issued in 2010. That it was so, so went the further contention, is supported by the reference BYO/METRO/04/10. As a result, it argues that the finding of fact by the court *a quo* that the subdivision permit was not in operation at the time of signing the treaty was so irrational that it defied logic. The appellant said such a finding was not supported by the evidence before it.

[14] On the other hand, the respondent argues that the permit was granted in 2023 when it had been applied for in November 2010. It further contends that in March 2023, Umguza Rural District Council had flighted an advertisement to the effect that all developments on Lot 1 27A Lower Rangemore had been done without a subdivision permit. The respondent is of the further view that the court *a quo* did not err or act irrationally in holding that when the agreement of sale was entered into there was no permit, and that in consequence the agreement was prohibited by statute and could not be enforced. It was a nullity. For that proposition, the respondent relies on the reasoning of this Court in the case of *Phillip Tsamwa v Ndoda Hondo & Ors* HH-52-08 where it was held that once the agreement between the parties is illegal, it is not necessary to determine issues referred to trial or those that arose or emerged from the evidence placed before the court.

[15] The court *a quo* equally relied on the cases of *Chioza v Siziba* SC-4-15 and *Tsamwa v Ndoda (supra)* to conclude as it did.

[16] In our view, the evidence in the record of proceedings speaks for itself on the contested issue. The first point that we note is that at all times in the correspondences, pleadings and evidence before this Court, the subdivision permit in issue is referred to as BYO/METRO/04/10. The reference needs no further explanation. It means that the permit was sought and issued in April 2010. The irrefutable evidence of such issuance is further demonstrated in the agreement of sale between Glastonbury Dairy Produce (Private) Limited and the appellant, which was enter into before 2023. In that

agreement there is reference to the same subdivision permit. The agreement of sale stated *inter alia* that:

> "**AND WHEREAS** by subdivision permit BYO/METRO/RC/04/10 with diagram BE23, inherited by the Seller from its predecessor in title, the Seller is authorised to subdivide the property as aforementioned."

[17] The above correspondence proves not only on a balance of probabilities but beyond reasonable doubt, the existence of a subdivision permit for the land in question prior to 2 May 2023 for two reasons. First, as this Court explained in *Lloyd Sesa v Hawkflight Enterprises (Private) Limited* case *(supra),* which, as already stated, was not only founded on the same facts and circumstances, but was argued on the same day by the same set of counsel, the argument that the permit under cover of a letter dated 2 May 2023 was a new permit is simply a red herring. As argued by the appellant, what the Ministry of Local Government issued on that date was a copy of the existing permit. Second, the references of the permit as in BYO/METRO/04/10 are the same references which appear in the parties' agreement of sale. That agreement predates the letter of 2 May 2023 by years. It is impossible that the parties would have inserted the details of the permit that would be issued years later. The agreement of sale itself referred to that permit in its preamble. No further argument about the absence of subdivision permit can hold water. In *Lloyd Sesa v Hawkflight Investments*, we extensively dealt with the issue of the same permit and concluded that:

> "A perusal of the parties' agreement of sale which appeared at p. 76 of the record showed that the introductory paragraph referred to subdivision number BYO/METRO/04/10 and the corresponding diagram. As argued by the respondent, that detail spoke to a permit that had been issued in 2010. The respondent said it was correct that Umuguza RDC could have been in the dark about the permit because it was not the one that had issued it. The permit had been issued by the then Ministry of Local Government and Public Works which administered the land in question at the time. That argument was logical. Its logic was illustrated by documentary evidence inadvertently produced by the appellant himself. He wanted to buttress his argument that there had been no subdivision permit and first produced a prohibition notice referring to a portion of land called Lot 27A Lower Rangemore. On the other hand, the respondent argued that the land sold to the appellant is properly described as Lot 1 of Lot 27A of Lower Rangemore. It said as such, it was incumbent upon the appellant to have led evidence from the issuer of the notice to demonstrate that the prohibition related to the land under disputation. That was not done. Even if it were to be admitted (which it is not), that the notice related to the same land, the notice was stated in such vague terms that it was not possible to point out for what reason the prohibition notice had been issued. It stated three possibilities all of which were in the alternative. Those were that the prohibition notice had been issued because of:
>
> a. Lack of subdivision permit or

> b. Lack of approved layout plan or
> c. Lack of approval by Umguza Rural District Council as then planning authority."

[18] We reached the conclusion, which we arrive at again in this case because the issue in this case is about the same land and the same subdivision permit that the evidence which was before the court *a quo* spoke to a permit which was granted to Glastonbury Dairy in April 2010. It demonstrated that what the Ministry of Local Government had issued in 2023 was a copy of the permit which had been issued in 2010. It further illustrated that the basis of the respondent's allegation that there was no permit was nothing but the so-called prohibition notice which had allegedly been issued by Umuguza RDC. Yet it was shown by the appellant that Umuguza RDC was not the planning authority at the material time. As such, it might not have been aware of the existence of the permit. In any case, the appellant again showed that there was no evidence to show that the prohibition order had been issued because there was no subdivision permit because the issue of a permit had just been listed amongst a host of alternative breaches. Without the evidence of Umuguza RDC, the prohibition order could not be relied on if at all it ought to have been considered. For someone to then choose that it had been issued because there was no subdivision permit would simply amount to speculation. It could have been for any of the three reasons stated above.

[19] We added in *Loyd Sesa v Hawkflight Investments,* which we restate in this case once more, that the incontrovertible evidence about the permit is that on 26 April 2023, correspondence had been written to the Ministry of Local Government. In it a request was made that the Ministry clarifies the question of the subdivision permit to the land in Emthunzini. The Ministry had then replied to the correspondence on 2 May 2023, through a minute addressed to several addressees including Glastonbury and Umuguza RDC. The letter stated was couched as follows: -

> "Reference is made to your minute AA/4N/dated 26 April 2023.
> Please find **a copy** of the Permit Number BYO/METRO/04/10 together with diagram number BF49 for your information." (Bolding is my emphasis)

[20] If the above issues could not prove that the permit was issued way before the agreement sought to be impugned had been entered into, then nothing would. As stated

earlier, the permit dated 2 May 2023 was not a new permit. On that date, the Ministry issued a copy of an already existing permit. The references of the permit as in BYO/METRO/04/10 in the letter are not similar but are exactly the same as those which appear in the parties' agreement of sale. The agreement between the parties had been entered into more than a decade before 2 May 2023. In the end the above reasons support our conclusion that the argument about the permit was just a sideshow scripted by a party who clearly breached the conditions of her agreement of sale. The argument about the absence of a subdivision permit must simply end there.

[21] Given the above, we conclude therefore that not only was there a subdivision permit but that the same permit which allowed for the subdivision of the contested land in Emthunzini actually predated the agreement of sale between the appellant and the respondent in this matter.

[22] Needless to state, the ground of appeal raised by the appellant in the above regard is clearly meritorious. Accordingly, it is upheld.

[23] Because we found that a subdivision permit existed, it means that the only defence which the respondent had to the appellant's claim in the court aquo fell off. We have already dealt in passing, with the second issue of whether or not the court aquo erred in dealing with a point of law which had not been pleaded by the parties we hold the position that its resolution, in view of the dispositive effect that the existence of a permit has to the appeal, there is no reason for us to dwell on it any further. It would not change anything. We therefore choose not to belabour this judgment with it.

Disposition

[24] There is no gainsaying the merits of this appeal. The finding by the court *a quo* that there was no subdivision permit for the disputed land was so irrational and contrary to the clear which suggested otherwise which had been placed before it that no court acting reasonably and properly applying its mind would have arrived at that

conclusion. The court aquo did not deal with all the other issues which had been raised in the pretrial conference minute. We cannot determine them in this appeal.

Costs

[25] Ordinarily, the law is that costs follow the result. We have not been persuaded or given any valid reason why we should depart from that rule.

[26] As a result, we direct that:

a. The appeal succeeds with costs
b. The judgment of the court *a quo* be and is hereby set aside
c. The matter be and is hereby remitted to the court *a quo* for the determination before the same magistrate, of the substantive issues raised in the parties' pretrial conference minute

MUTEVEDZI J…….

CH IVAYO J agrees……

Maseko Law Chambers, appellant's legal practitioners
Messrs Majoko and Majoko, respondent's legal practitioners