ALLEN MUTARA
versus
FADZANAI BRIAN MUTOPO
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 January & 29 March 2023

Opposed Matter

Ms *S V Tendere*, for the applicant
Mr *Makanza*, for the respondent

MANGOTA J:

At the center of the dispute of the applicant and the first respondent ("the parties") is a piece of land which is situated in the district of Salisbury called Stand 223, Marimba Park Township, Marimba Park, Harare ("the property"). It is 2011 square meters in extent. It is held under Deed of Transfer 3607/21.

The narrative of the applicant one Allen Mutara ("Allen") in respect of the property is clear, simple and straightforward. It is to the effect that he, on 9 February 2022, purchased from the first respondent one Fadzanai Brian Mutopo ("Brian") the property for USD85 000 which he paid in full. Brian, he alleges, granted a special power of attorney to one Jon-Nomatter Kadoka, a legal practitioner and conveyancer, to transfer the property to him. His further allegation is that Brian signed the seller's declaration in terms of which he declared that he sold the property to him and that he (Allen) had paid to him full purchase price to the tune of USD85 000.

Brian, Allen alleges, is refusing to pass title in the property to him. He, accordingly, moves me to compel Brian to transfer title in the property to him. He couched his draft order in the following terms:

> "1. Application to compel transfer of immovable property from the Respondent to the Applicant be and is hereby granted.
>
> 2. Respondent be and is hereby ordered to sign all transfer papers, make all appearances, pay all tax obligations as may be necessary to effect transfer of certain piece of land situate in the district of Salisbury called Stand 223, Marimba Park Township of Marimba Park, measuring 2011 square meters held under Deed of Transfer No. 3607/21 to the Applicant within 7 days of the granting of this order.
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> 3. Should the Respondent fail to effect transfer within 7 days of granting of this order, the Sheriff for Zimbabwe or his deputy are (sic) authorised to sign all necessary documents on behalf of the seller and to do all such things as may be needful (sic) to effect transfer of the immovable property mentioned in clause 2 above into Applicant's name."

The second respondent whom Allen cited in his official capacity did not file any notice of opposition to the application. My assumption is that he intends to abide by my decision.

Brian, on the other hand, opposes the application. He denies having ever sold the property to Allen. He alleges that Allen and him entered into a verbal loan agreement in terms of which the agreement of sale was used as security for payment of the loan which Allen advanced to him. He insists that there is a material dispute of fact which can only be resolved by *viva voce* evidence and not on the papers which Allen filed of record. He denies that Allen paid to him the sum of USD85 000. He alleges that he received a loan of USD18 500 from Allen. He claims that he signed the agreement of sale with a view to getting the money to financing his mining project. He moves me to dismiss the application with costs which are at attorney and client scale.

In his counter-application which he filed together with his notice of opposition, Brian moves me to:

a) cancel the agreement of sale which Allen and him concluded – and
b) direct Allen to return to him the original title deed number 3607/21 upon payment by him to Allen of USD 18 500 together with interest at the prescribed rate within 7 days of the court order.

He alleges, in support of his abovementioned prayer, that, in February 2022 and at Harare, pursuant to an oral loan agreement between Allen and him, he pledged with Allen his title deed number 3607/21 for a house in Marimba Park namely house number 223, Msasa Drive, Old Marimba,

Harare as security for the sum of USD18 500 which Allen advanced to him in the following traunches:

i)	February, 2022	USD15 000
ii)	April, 2022	USD 2 000
iii)	April, 2022	USD 500
iv)	May, 2022	USD 1 000

Allen denies the allegations of Brian as the latter stated them in his counter-application. He insists that I cannot, as a court, cancel the contract of the parties. Cancellation of the same, he asserts, rests with the one or the other of them with the court only confirming if the cancelling party has lawfully exercised his right to cancel the agreement. He states that the counter-application does not disclose a cause of action. He denies having ever entered into a loan agreement with Brian. He claims that the two of them concluded a contract of purchase and sale of the property. He moves me to dismiss the counter-application with costs which are at attorney and client scale.

The main application succeeds and the counter-application fails.

The counter-application fails for a variety of reasons. Chief amongst those reasons is the incompetent nature of the relief which Brian is moving me to grant to him. A contract is, by definition, an agreement which is intended to be enforceable at law. The agreement is, more often than not, made by or between two or more persons who have the legal capacity to contract. The court is not any of those persons. It is a stand- alone institution which has nothing to do with the contract which persons enter into between themselves.

The contract defines terms and conditions which each party to it must abide by. Where a party makes a breach of the contract which he has concluded with the other party, the aggrieved party has the right, depending on the breach, to either claim damages or to cancel the contract. The choice remains with him. Where he chooses the latter option, he, and not the court, cancels the contract right-away. He invites the court to assess and determine if his cancellation of the contract is within, or without, the law. The court cannot cancel the contract to which it is not a party. Doing so by it would be tantamount to making and/or unmaking contracts for parties. All what the court is capable of doing is to ascertain the circumstances under which the aggrieved party has cancelled the contract and, where the cancellation is justified at law, it confirms the cancellation.

I cannot, in view of the above-stated set of circumstances, cancel the contract of purchase and sale which Allen and Brian concluded on 9 February, 2022. What Brian is inviting me to do in respect of clause 1 of his draft order is what MATHONSI J eloquently spoke against when he stated in *Fastgrip Investments (Pvt) Ltd* v *Klipspringer*, HB 286/17 that:

> "It is a cardinal principle of our law of contract that contracts entered into by parties out of their free will are sacrosanct. ...The doctrine of sanctity of contract stipulates that men and women of full legal capacity and competent understanding are at liberty to contract with one another. When they have so contracted freely and voluntarily, their contracts are held sacred and must be enforced by courts of law who shall not lightly interfere with that freedom of contract. As a matter of public policy, courts of law not only do not interfere with the freedom of the parties to contract as they please as long as the contracts are lawful, they also do not make contracts for the parties but only enforce and give effect to what the parties have agreed to."

The above-cited *dictum* makes it clear that it is not the business of the court to make or unmake contracts for parties. These make their own contracts. They only invite the court to deal with their contracts in certain specified circumstances where breach is alleged to have occurred or where one of them has chosen to work outside the terms and conditions of the same.

Brian who is a signatory to the contract of purchase and sale which he concluded with Allen has every right to cancel the same if such is his intention. He has not shown why he cannot do so. He cannot competently request me to do it for him when I am not privy to what Allen and him agreed upon between them.

Annexure SMI which Allen attached to his application shows that, on 9 February 2022, he purchased the property from Brian for USD85 000. The annexure appears at page 7 of the record. Clause 2 of the same shows that Allen paid the sum of USD85 000 as purchase price for the property. The requirements for the contract of purchase and sale are therefore fully realized. These comprise:

a) *emptor et venditor* (buyer and seller-parties capable of entering into an agreement of sale)
b) the *merx* (the thing or things, the subject matter of the agreement of sale)
c) the *pretium* (the price in money or which is readily ascertainable in terms of money)
d) *consensus ad idem* (the mutual consent of the contracting parties)
Norman's Purchase and Sale in South Africa, 4th edition, p 2.

The contract of purchase and sale, Annexure SMI, as it appears at pp 7-11 is couched in clear and categorical terms which do not render themselves to anything which falls under the delict of misrepresentation, fraud, undue influence and/ or duress. Brian, on his part, does not allege that

he was not in his full senses and/or his cognitive faculties when he appended his signature to the annexure. He, in short, does not claim that Allen misrepresented any matter to him or that he deceived or coerced him into signing the agreement of sale.

Given that Brian signed the contract without any misrepresentation being brought to bear upon his mind by Allen and/or without him being either deceived or unduly influenced to sign the contract when he did, Allen's statement which is to the effect that the counter-application does not have a cause of action is more real than it is fanciful. It is more real in the sense that Brian cannot rest his counter-application on nothing and expect it to stay there. It will collapse: *MacFoy* v *United Africa Co. Ltd*, (1961) 3 All ER 1169 (PC) at 1172.

Indeed, when Allen challenged Brian to state his cause of action for the counter-application, Brian only stammered at the challenge. He appeared not to have appreciated the meaning and import of the phrase '*cause of action*'. His statement which is to the effect that he only borrowed money from Allen and that there was a verbal loan agreement betrays his lack of understanding of the phrase. This is a *fortiori* the case when regard is had to paragraphs 3.2, 3.3. and 3.4 of his answering affidavit. The paragraphs appear at page 106 of the record.

The phrase cause of action was aptly defined in *Abrahamse & Sons* v *SA Railways & Harbours*, 1933 CPD 636. It is pertinent for me to restate the definition as given in the case for the benefit of Brian. A cause of action, as was succinctly stated, is an entire set of facts which gives rise to an enforceable claim. It includes every fact which is material to be proved to entitle a plaintiff or an applicant to succeed in his claim. It includes all what the plaintiff or applicant must set out in his declaration or founding affidavit in order for him to disclose a cause of action.

Brian has not, *in casu*, set out any material facts upon which the cause of action for duress, fraud, misrepresentation or undue influence can be said to support his counter-application. He has not, in short, pleaded any of the mentioned delictual grounds to justify or sustain his case. He, accordingly, has no cause of action for the counter-application which he mounted.

The narrative of Brian appears to be more of a made-up story than it is a reality. He alleges that he entered into a verbal loan agreement with Allen. He does not state the date that Allen and him concluded the verbal loan contract, if ever it was. Nor does he state the terms of the same other than to claim, as he is doing, that the agreement of sale was used by Allen and him as security for the loan which Allen advanced to him. One is therefore left to wonder if ever the statements of

Brian are anything to go bye. This is a f*ortiori* the case when regard is had to the fact that Brian does not state the amount of money which he requested Allen to advance to him as a loan, if ever such was advanced. Nor does he state the interest which Allen and him agreed between them that he would pay in addition to whatever capital sum which he requested Allen to advance to him in the form of a loan. He would not have me believe that the only condition/term which Allen and him factored into the verbal loan contract was/is that the agreement of sale which both of them signed on 9 February, 2022 would save as security for the loan. Premising his statement on that matter alone would be akin to premising his whole case on nothing which is worthy of belief.

Annexure SM1 which Allen attached to his founding papers as read with Annexures SM2 and SM3 which respectively appear at pages 13 and 14 of the record satisfy the *res ipso loquito* principle. The annexures speak for themselves. They show, in clear and categorical terms. That:

i) Brian sold the property to Allen;
ii) Brian passed a power of attorney in terms of which he appointed one Jon-Nomatter Kadoko whom he authorised to transfer title in the property from him to Allen-and/or
iii) Brian signed the sellers' declaration in terms of which he acknowledged that:
    a) he sold the property to Allen – and
    b) he received from Allen purchase price of USD85 000

The above-mentioned three documents coalesce into one statement. The statement is that Allen purchased the property from Brian and paid to the latter the sum of USD85 000 as purchase price.

Purchase and sale, it is agreed, is a synallagmatic contract. It creates rights and obligations as between the parties. The seller's right is to receive the purchase price. His concomitant obligation is to deliver the thing (*merx*) to the purchaser. The buyer's duty is to pay the purchase price. His right is to receive delivery of the thing which he purchased.

Where, as *in casu*, Allen has paid the purchase price in full, his right to delivery of the property remains unquestionable. It is for the mentioned reason, if for no other, that Allen filed this application moving me to compel Brian to perform his own side of the contract which the two of them signed. Brian should transfer title in the property to Allen who, in short, is moving for the remedy of specific performance. The remedy is available to a party who has performed, or who stands ready to perform, his part of the contract: *Farmers' Corp Society (Reg)* v *Berry*, 1912 AD 343 at 350.

Whilst ROBINSON J lamented the unwholesome conduct of businessmen who fail to honour the contracts which they make with other parties and the consequences which are likely to befall them, the learned judge's lamentations apply with equal force to the case of Brian vis-à-vis his attitude to the contract which he signed with Allen. The learned judge warned such persons as Brian to desist from such unbecoming conduct when he remarked in *Intercontinental Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd*, 1993 (1) ZLR 21 (H) that:

> "……. Businessmen beware. If you fail to honour your contracts, then don't start crying if, because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract…..businessmen who wrongfully break their contracts must not think they can count on the courts when the matter eventually comes before them simply to make an award of damages in money. …Businessmen at fault will therefore in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them".

Brian, it is evident from a reading of his papers, does not advance any grounds showing why specific performance should not be decreed. He does not tell why he signed the contract of purchase and sale and not that of a loan. He does not tell why he signed the special power of attorney and the sellers' declaration both of which documents relate to transfer of an immovable property which has been sold by the seller to the purchaser. He does not deny that the signature which appears on the agreement of sale, the special power of attorney and the sellers' declaration is his own signature. He does not explain why he entered into the contract which he insists is not speaking to the intention of Allen and him.

The reality of the matter is that Brian freely and voluntarily concluded the contract of purchase and sale with Allen. He signed it with his eyes wide open. He does not claim that Allen deceived him into signing it. Nor does he allege that Allen coerced, or unduly influenced, him into signing the same. He is, accordingly, bound by the *caveat subscriptor* rule in a very inexplicable manner.

R.H. Christie describes the meaning and import of the above-mentioned rule in a clear and succinct manner. He does so in his *Business Law in Zimbabwe*, p 67 wherein he states that:

> "The business world has come to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract and, if the principle were not upheld, any business enterprises would become hazardous in the extreme."

Nyika v *Moyo* HB 145/10 explains in detail what the *caveat subscriptor* rule entails. It states that:

> "The general rule, sometimes known as the *caveat subscriptor* rule is…. that a party to a contract is bound by his signature whether or not he has read and understood the contract. …and this will be so even if he has signed in blank… or it is obvious to the other party that he did not read the document."

Brian does not state that he did not read the contract. Nor does he allege that he did not read the special power of attorney and/or the sellers' declaration both of which documents he signed. What he, however, does not explain is why he appended his signature to three documents which, according to him, do not deal with any money being advanced to him by Allen but with the contract of purchase and sale of the property to Allen by him. He does not claim that he was in a drunken state of mind when he signed the three documents. He, in short, cannot explain what, if anything, persuaded him to act in the manner that he did.

The probabilities of the matter the papers of which the parties placed before me are that Brian sold the property to Allen and signed the documents which are necessary to transfer title in the property from him to Allen and he made up his mind to resile from the contract by introducing into the case what he terms his Audio Transcript which he gives the title EXHIBIT 2: ENGLISH TRANSLATION OF AUDIO TRANSCRIPT. The transcript is supposedly his conversation with Allen.

The transcript suffers a number of hurdles. The first is that the person who translated the audio is not known. His or her qualifications remain unknown. The language from which it was translated into English is also unknown. The transcript therefore constitutes inadmissible evidence: Section 26 of the Civil Evidence Act [*Chapter 8:01*]. The second hurdle which Brian has to overcome is clause 9 of the agreement of sale which Allen and him signed. It reads as follows:

> "The parties acknowledge that this agreement constitutes the entire contract between them in relation to the abovementioned subject matters and there shall be no variation of it save in writing and signed by both parties."

Allen correctly observes that the parties' written agreement constitutes the entire terms of their transaction and that anything which is outside of it is irrelevant and inadmissible. It follows, from the stated matter, that the audio transcript which Brian seeks to introduce into the record cannot be admitted. Brain's allegation of the existence in the case of material disputes of fact remains without merit. He created that matter as a way of avoiding clear and uncontroverted evidence which Allen

led against him. His attempt to use the audio transcript to create what he terms material disputes of fact fell to pieces as soon as it was discovered that evidence of the transcript cannot be introduced into the case of the parties especially in view of clause 9 of the parties' agreement. The emphasis which exists in clause 9 of the parties' contract was accorded special meaning by R.H. Christie who states in his *Law of Contract in South Africa, 7 Ed.* at page 2, that:

> "When parties to a contract have decided that it should be in writing, they are creating themselves the advantages which a written contract offers; namely an opportunity to study the terms before committing themselves, simplification of proof of the terms and a drastic reduction of the scope for argument about the terms. These advantages would be lost if, in the event of a dispute, the parties were permitted to give evidence to vary or contradict the written contract."

It follows, from a reading of the foregoing matters, therefore, that the written contract of the parties stands and the alleged unwritten contract cannot stand. Allen, it is evident, proved his case on a preponderance of probabilities. Brian, on the other hand, failed to proffer any defence to Allen's claim and he also failed to sustain his counter-application.

In the result, the main application is granted as prayed and the counter-application is dismissed with costs.

Munangati & Associates, applicant's legal practitioners
Makanza Law Chambers, respondent's legal practitioners