NICHOLAS MUKWAIWA
and
MARTHA MUKWAIWA
versus
MARVELLOUS SHUMBA
and
SHONGWE PROPERTY DEVELOPMENT (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 23 March, 2022 & 6 July 2022

Opposed Matter

B Mahuni, for the applicant
T Nyamucherera, for the 1st and 2nd respondent

MANGOTA J: Mr and Mrs Mukwaiwa ("the applicant") sued one Marvelous Shumba, a natural person and Shongwe Property Development (Private) Limited, a legal entity, ("the respondent") for the remedy of specific performance. It is the applicant's case that it, on 30 October 2017, purchased from the respondent Plot 73 Halfway Farm, Kadoma ("the property") for the sum of USD 3000 which was payable as follows:

i) USD 1500 was to be paid by it upon signing of the contract;
ii) the remaining USD 1500 was to be paid by it on 30 January, 2018;
iii) the entire purchase price for the property was to be paid into the account of the second respondent, the legal entity, which managed the property;
iv) the applicant, it was agreed, would be levied a monthly development levy of USD$50 for sixty (60) month s– and
v) the applicant would be entitled to take transfer of the property as soon as it paid the purchase price in full.

The applicant alleges that it paid full purchase price for the property. Hence its current application in which it moves me to compel the respondent to transfer title in the property to it.

The above-mentioned set of circumstances places the contract of the applicant and the respondent ("the parties") into that of purchase and sale. In such a contract, one person, or entity, the buyer or purchaser, acquires property from another, the seller, in return for the payment of a sum of money, the price: *G.Bradfield. K. Lehmann, Principles of the Law of Sale & Lease, 3rd edition*, page 4. For the agreement to be said to have ripened into a contract, four elements must be present. These are:

a) the seller who wishes to sell; and
b) the purchaser who wishes to purchase;
c) a thing (or the *merx*) for
d) a certain price (*or pretium*).

Where one of the above mentioned elements is absent, the agreement may be something else and not that of sale.

Certain rights and obligations flow from a contract of sale which is properly concluded. It is, for instance, the seller's right to receive the price from the purchaser for what he has sold to the latter. His concomitant obligation is to deliver the thing sold to the purchaser. It is the purchaser's right to insist on delivery to him of the thing which he purchased. His obligation is to pay the purchase price to the seller. Once he has paid such in fulfilment of the contract, he has every right to sue for specific performance where the seller has either not performed or has, without lawful excuse, refused to perform.

As INNES JA correctly enunciated in *Farmers' Co-operative Society* v *Barry*, 1012 AD 343 at 350 that:

> "….every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other, so far as it is possible, a performance of his undertaking in terms of the contract."

In remarking as he did, the learned judge was only following the principle which KOTZE C.J. eloquently pronounced in *Thompson* v *Pullinger* (1894) OR 298 at 301 wherein he stated that:

> "The right of a plaintiff to specific performance of a contract where the defendant is in a position of doing so is beyond doubt".

This court re-emphasized the position which the abovementioned superior courts of other jurisdictions took on the subject which relates to specific performance when it remarked in *Mwerenga* v *City of Harare & Another,* HH 262/21 that :

> "A party who has performed his own side of the contract has every right to claim specific performance from the other. A purchaser who has paid full purchase price for the property which he purchased does not waste his time. He, for instance, does not move the court to declare him the owner of what he purchased and paid for. He knows that declaring him the owner when the circumstances show otherwise will not weigh in his favour. He sues and moves the court to compel the defendant or the respondent….to deliver to him the thing which he purchased. His suit will, however, be subject to the qualification that he pays the purchase price in full for the property. Where he alleges and proves, on a balance of probabilities, that he discharged his obligation in an unqualified manner, his day in court will not be regarded as a wasted one. It will be a well-rewarded one".

An applicant who sues for specific performance must allege and prove that:

a) he purchased the thing from the defendant or the respondent;
b) he paid full purchase price for the thing;
c) the defendant or the respondent is refusing to deliver the thing to him- and
d) he moves that the thing be delivered to him by way of a court order.

Annexure A which the applicant attached to its application is relevant. It appears at page 9 of the record. The annexure is the agreement of purchase and sale which the parties concluded between them on 30 October, 2017. Clause 7 of the same allows the respondent to give vacant possession of the property to the purchaser after the latter has paid full purchase price.

The parties pegged full purchase price at USD 3000. Annexure B relates to the applicant's payment of the purchase price for the property. This appears at page 15 of the record. It shows that the applicant paid the first traunche of USD 1500 on 27 October, 2017 and the last traunche of the balance of the purchase price as follows:

i) 7 November, 2017……USD 1200 – and
ii) 1st February, 2018……USD 300
iii) Grant total…….USD 1500

It is on the strength of the foregoing matters that the applicant moves me to compel the respondent to transfer title in the property to it. It met the requirements which are stipulated in clause 7 of the contract. It should therefore have title in the property registered in its name.

Annexures B1 and B2 are advance payments which the applicant made in compliance with clause 11.2 of the contract. The clause places upon it the obligation to pay monthly development levy of USD 50 for sixty months. The levy covers what are normally referred to as development costs. The applicant paid a total of USD950 and left a short-fall of USD 2050 which it committed itself to paying off on or before 25 April, 2022.

The applicant's none-payment of the development levy in full constitutes the respondent's first line of defence. It argues that the applicant which is in breach of the contract cannot move for specific performance. It claims that the applicant paid development levy for fifteen (15) months. The payments, it insists, do not cover years 2019, 2020 and 2021. It places reliance on clause 10 of the contract. This defines the meaning and import of the word *breach*.

The applicant's statement on the issue of its alleged breach of contract is to the contrary. It states that the agreement of sale does not import into it the issue of non-payment of levies as a condition precedent for the transfer of the property to it. It insists that full payment by it of the purchase price within the prescribed time was/ is all what was/is required for the respondent to transfer title in the property to it.

It is observed that, although the issue of payment of development levy is a term of the contract of the parties, that term was/is not intricately connected to the issue of transfer of title from the respondent to the applicant. The issue of payment of the development levy rests on a cause which is separate and different from the parties' obligations *vis-à-vis* their contract. As the applicant correctly states, it is not at all in breach of the contract as the respondent would have me believe. If it was, the respondent would not have initiated the process of transfer of title in the property from it to the applicant. It, for instance, requested payment of transfer fees and value added tax. It made arrangements for the applicant to attend interviews for capital gains tax assessment.

The conduct of the respondent, as captured in the foregoing paragraphs, does not resonate with that of a party who believed that the other party, *in casu* the applicant, was in breach of the contract. The stated conduct is well *in sync* with that of a party who is happy with the performance by the other of the latter's own side of the contract. The respondent, it is observed, did not ever write to the applicant alleging breach by the latter or seeking that it remedies the same in terms of clause 10 of the parties' contract. The contents of the clause upon which it places reliance are

clear and succinct. They confer upon the aggrieved party, the respondent *in casu*, the right to cancel the contract, regain possession of the property and to claim damages where the offending party fails to remedy the breach within fourteen (14) days of his receipt of the written notice to the stated effect.

The fact that the respondent did not write alleging breach on the part of the applicant shows, as the latter suggests, that no such breach ever came into existence. If it did, then as the applicant correctly states, the respondent waived its right to raise the issue of breach. When a person entitled to a right knows that it is being infringed, and by his acquiescence, leads the person infringing it to think that he has abandoned it, then he would, under certain circumstances, be debarred from asserting it: *Chidziva and Others* v *Zimbabwe Iron & Steel Co. Ltd*, 1007 (2) ZLR 368 (S); *Mutual Life Insurance Co of New York* v *Ingle*, 1910 TPD 340.

DUMBUTSHENA CJ discussed the principle of waiver when he remarked *in Barclays Bank of Zimbabwe Limited* v *Binga Products (Pvt) Ltd*, 1985 (3) SA 1041 (ZS) at 1049 B-E as follows:

> "I seek, however, to highlight the principle of waiver set out by Lord Denning MR at 140 a-c where he said: "The principle of waiver is simply this, if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act on that belief, and he does so act on it. Then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so"

It will be inequitable for the respondent to insist on a right which it abandoned. It cannot, in short, place reliance of its defence on a right which it waived. The doctrine of quasi-mutual assent operates against it in the circumstances of this case. Lord Blackburn aptly enunciated the doctrine in *Smith* v *Hughes,* (1871) L R 6 QB 597 at 607 wherein he said:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, that man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

The defence which the respondent premised on the applicant's non-payment of development levy is not available to it. It is not available for a variety of reasons among which are the law which has just been analysed in the foregoing paragraphs and the applicant's expressed intention to pay off the balance of the development levy on or before end 25 April, 2022. It is trite that a party who is prepared to perform his obligation in terms of the contract has every right to compel the other to perform his side of the contract as well: *Farmers' Co-operative Society* v *Barry* (*supra*)

The *in limine* matter which the respondent raises on the joinder or otherwise of the second respondent is better not raised than raised. Both respondents concluded the contract with the applicant. The second respondent manages the property which constitutes the *merx* of the parties' contract. The applicant paid both the purchase price and the development levies into the account of the second respondent. The second respondent cannot, on an analysis of its circumstances, be said not to have a direct and substantial interest in the issue which the applicant placed before me. It, if anything, has such interest. It is, accordingly, properly cited making the *in limine* matter which had been raised to stand on no leg. It is without merit and it is dismissed.

The applicant proved its case on a preponderance of probabilities. The application is, in the result, granted as prayed. The applicant shall pay the remaining portion of the development levy on or before 25 April, 2022.

Scanlen & Holderness, applicant's legal practitioners
Lawman Law Chambers, first and second respondent's legal practitioners