REPORTABLE: (64)

[1] BENJAMIN CHAMWAITA [2] MARCELINE CHAMWAITA
v
MARY MUCHENGETI

SUPREME COURT OF ZIMBABWE
GARWE JA, PATEL JA & BERE JA
HARARE: 14 MAY 2019 & 7 JULY 2022

L. Madhuku, for the appellants

S.M. Hashiti, for the respondent

GARWE JA

[1] This is an appeal against the judgment of the High Court of Zimbabwe granting an order for the eviction of the appellants and all other persons claiming occupation through them, from a property known as Share Number 24 of Subdivision A, Portion of Mayfield Estate, also known as Monavale Cluster Homes.

[2] The court *a quo* found that the allocation of Share Number 24 to the appellants did not constitute a sale and that the law on successive sales was therefore not applicable. The court further found that, in any event, the appellants had, before taking over occupation of the property, deliberately refrained from knowing the exact status of the property in question and were therefore not innocent purchasers. Although the court *a quo* found that the

appellants had constructed a structure on the property, it further found that the structure was illegal and therefore did not constitute an improvement on the property. As a consequence, the court *a quo* made the order for the eviction of the appellants from the property and for them to pay the costs of suit.

[3] Having considered the facts of this matter and the concession by the respondent at the hearing of this matter that, indeed, there had been a double sale of the property by the developer to both the appellants and the respondent, I am of the considered opinion that the court *a quo* erred both in its finding that the appellants were not innocent purchasers and in the exercise of its discretion in coming to the conclusion that there were no special circumstances affecting the balance of equities in favour of the appellants. Its ultimate conclusion that, if indeed there had been a double sale in this case, the respondent, as first purchaser, had a stronger claim than the appellants was therefore a misdirection. The appeal must therefore succeed with costs.

[4] There is a further aspect of this matter that calls for comment at this stage. The matter was heard by this court on 14 May 2019 and judgment was reserved. Bere JA, who was a member of the panel, was allocated the responsibility of preparing the draft judgment of the court and thereafter to circulate the draft amongst the other members of the panel. Unfortunately he subsequently left the bench before doing so and it only came to light recently that the judgment in this matter had remained outstanding. The delay in the determination of the dispute between the parties has without doubt been inordinate and must

have prejudiced the parties. Such is sincerely regretted but was occasioned by the circumstances just outlined.

FACTUAL BACKGROUND

[5] The property that lies at the centre of the dispute between the parties is a portion of Mayfield Estate also known as Monavale Cluster Homes. Mayfield Estate is approximately ten (10) hectares in extent. In May 2003, a company by the name Maffack Asset and Fund Managers (Pvt) Ltd ("Maffack") entered into an agreement of sale with the B S Leon Trust, the original owner of the property. Having paid the purchase price for the property in full, Maffack applied to the City of Harare for a permit to subdivide the property into thirty (30) residential cluster units. Pursuant to the grant of the subdivision permit by the City of Harare, Maffack entered into various agreements with various purchasers for the sale and development of cluster houses on the property. The respondent signed an agreement of sale with Maffack on 25 January 2006 in respect of Share 24 measuring 814 square metres. It was common cause before the court *a quo* that she paid the full purchase price of nine hundred and seventy four million nine hundred thousand Zimbabwe Dollars (Z$974 900 000).

[6] On a date that is unknown, one Elina Maraidza also entered into an agreement of sale with Maffack for the purchase of Share Number 10 measuring eight hundred and sixty four square metres (864 square metres). Having paid for the property, Elina Maraidza had a change of mind and decided to dispose of the same. She then advertised the property for sale and on 22 June 2007, as seller, entered into an agreement of sale of Share Number 10 with

the first appellant for the sum of five hundred and fifty million Zimbabwe dollars (Z$550 000 000). With the consent of the first appellant, the purchase price was released to Elina Maraidza immediately and she thereafter dropped out of the picture, having ceded her rights in respect of the property to the first appellant. Such cession was accepted by Maffack on 27 June 2007.

[7] From the record of the proceedings, it is apparent that, not long after this, Maffack found itself in financial dire straits due to the inflationary environment that characterised the period from 2007 to 2009. In February 2008 Maffack, through its lawyers, wrote to the various purchasers of the individual units advising that, due to inflation, it was unable to proceed further with construction work at the site. Consequently, during the same month it made an offer, which was said to be without prejudice, to the purchasers of the stands to pay an additional thirty six billion dollars per unit. The letter to the purchasers made it clear that if any purchaser failed to pay by 31 March 2008, Maffack would consider the agreement terminated and would refund the equivalent of sixty percent of the current market value of the stand. It is common cause that the respondent refused to pay, insisting that Maffack had the obligation to complete the works without any further contribution from the purchasers. The first appellant however complied and paid the additional amount of Z$36 billion requested by Maffack on 26 March 2008.

[8] On a date that is not indicated in the papers, Maffack, having sold Share 10 to yet another purchaser in unclear circumstances, decided to allocate Share Number 24, previously paid for by the respondent, to the first appellant. Consequent upon this decision, Maffack

entered into what it termed a "variation agreement" with the first appellant on 15 June 2009. The effect of that agreement was to substitute Share Number 24 in place of Share Number 10 on the same terms and conditions as previously agreed upon between Maffack and the original purchaser of Share Number 10, Elina Maraidza.

[9] It was not in dispute during the hearing before the court *a quo* that the appellants thereafter moved onto Share Number 24. They proceeded to erect a temporary structure made of concrete panels and iron roofing sheets. They also proceeded to dig a well and to have electricity installed on the stand by the Zimbabwe Electricity Supply Authority ("Zesa").

[10] On a date that is in dispute, the respondent visited Share Number 24 and discovered that the appellants had moved onto the stand. There were discussions subsequently during which the second appellant, in particular, advised her that they had been allocated the stand by Maffack. It was following this development that the respondent enlisted the services of her legal practitioners who proceeded to issue a summons seeking an order for the appellants to vacate the property.

[11] Evidence was led during the trial which revealed that the purchasers of the stands, who included the appellants, thereafter proceeded to form an association called the Monavale Cluster Home Association. The purpose of the association was to take over the obligations of Maffack in developing the stands in order to comply with the terms and conditions of the subdivision permit to enable the eventual transfer of the stands to the individual purchasers.

A deed of settlement incorporating the agreement was signed between Maffack, the developer, and the association. The individual purchasers were required to contribute financially to enable the association to carry out its mandate.

PROCEEDINGS BEFORE THE HIGH COURT

[12] In her evidence before the High Court, the respondent stated as follows. The structure constructed by the appellants was a temporary structure as the area had been demarcated for cluster homes. The structure could easily be demolished. She disputed the amounts allegedly expended by the appellants in developing Share Number 24 but accepted that they had indeed installed electricity on the stand. It was her evidence that the agreement of sale she had concluded for Share Number 24 was never terminated by Maffack. She confirmed that Maffack had undertaken to do construction work up to slab level on each of the units but had failed to do so. She further confirmed that Maffack held a meeting with the purchasers during which the company confirmed that it was experiencing viability issues and was unable to complete the construction of the roads or install water, electricity and sewage. It was her evidence that the purchasers then formed a committee to consider possible options but ultimately the purchasers rejected the idea of a top up, insisting that Maffack must abide by its obligations in terms of the agreements it had signed with the individual purchasers. She confirmed that electricity was installed on Share Number 24 but added that, at the stage when this was done, the appellants were aware of her claim to the stand.

[13] The first appellant's evidence (as first defendant) before the High Court was as follows. He purchased Share Number 10 from Elina Maraidza who had in turn purchased it

from Maffack. Mr Mafuta of Maffack then called him and advised him that Share Number 10 had been double sold to another party and that, in its place, he was to be allocated Share Number 24. Mr Mafuta made it clear that Maffack was the owner of all the stands and could move a purchaser from one stand to another. As a result, he and Maffack executed what they termed a variation agreement substituting Share Number 24 for Share Number 10 which Maffack had disposed of.

[14] He stated that Maffack wrote letters to all purchasers indicating that, owing to devaluation, they should all make additional payments to ensure that the construction work remained on track. As a result he paid the sum of Z$36 billion as a top up to the original purchase price he had paid. Following the payment, he was then given occupation of the stand, which was an undeveloped piece of land at that stage. He cleared the land and constructed a four roomed cottage which was to serve as a temporary structure. He proceeded to dig a well on the premises and had electricity installed on the stand by ZESA. It was also his evidence that when it became clear that construction work had stalled on the site, he and the other purchasers formed an association, with each paying a US$100 joining fee and a further sum of US$50 per month to finance the construction of the roads and other works. As regards the improvements on share Number 24 it was his evidence that he paid US$11 000 for the construction of the prefabricated structure, US$1 200 for the installation of electricity including the meter, US$255 for a pole required by ZESA and US$200 for electric cables. He agreed that the prefabricated structure that he and the second appellant, who is his wife, constructed was a temporary structure which could be removed after the construction of the main structure.

[15] The appellants called Mr Mafuta to give evidence before the court *a quo*. He told the court *a quo* that he was a director of Maffack Asset and Fund Managers, the owner and developer of the property. He agreed that Maffack was supposed to develop the individual units to slab level but failed to do so because of high inflation. In order to ensure completion of the work Maffack asked all purchasers to pay additional amounts of Z$36 billion. The respondent indicated that she was not prepared to make any further financial contributions to the project. All the other purchasers paid the amount that the company had requested from them. He therefore considered that the respondent's refusal to make the additional payment had the effect of terminating the agreement and that the only remaining obligation on the part of Maffack in the circumstances was to refund sixty percent of the amount the respondent had originally paid. However the amount was not refunded because she indicated that she was going to approach the courts. He confirmed that although Elina Maraidza had bought Share Number 10 and ceded her rights therein to the first appellant, Maffack later realized that the stand had been sold to another purchaser who had since paid a top-up and for that reason Maffack allocated Share Number 24 to the appellants.

[16] It was also his evidence that the appellants never got to know of the earlier agreement between Maffack and the respondent in respect of Share Number 24 because, by the time they paid the additional amount, he had, in his mind, terminated the agreement between Maffack and the respondent. Asked during oral evidence what progress had been made in the development of the stands, he told the court that sewer and water reticulation was now complete and tarring of the driveways was awaiting the end of the rainy season. It was his evidence that progress had been made after the purchasers formed an association which then

took over the financing of the various works on the site. He conceded that Maffack did not formally terminate its agreement with the respondent and that the respondent had not, in fact, breached any of the terms of that agreement. In his evidence he emphasized that substantial progress had been made in the construction work because of the top up payments made by the purchasers of the stands.

[17] In its determination, the court *a quo* made the following findings. That the additional payments that Maffack had demanded from the respondent were not provided for in the agreement of sale and that the agreement was never terminated. It also found that Maffack was not a party to the agreement between Elina Maraidza and the first appellant and, consequently, could not properly vary that agreement. The court found that the allocation of Share Number 24 to the appellants in these circumstances did not therefore constitute a sale.

[18] The court further found that even if it were to be accepted, *arguendo*, that the transaction between Maffack and the appellants constituted a sale, a double sale would have taken place and the principles applicable thereto would require to be considered. The court found that the appellants were not innocent purchasers as they had deliberately refrained from knowing the true facts relating to Share Number 24. The court further found that the structure that was constructed on the stand was an illegal structure which did not constitute an improvement. Consequently the court reached the conclusion that, in view of the fact that the respondent had been the first purchaser in time, the balance of equities did not favour the appellants who had purchased the property subsequently. The court accordingly found in

favour of the respondent and ordered the eviction of the appellants from Share Number 24 and payment of costs of suit.

PROCEEDINGS BEFORE THIS COURT

[19] Aggrieved by the above decision of the High Court, the appellants noted an appeal to this court seeking a reversal of that decision and in its place an order dismissing the respondent's claim (as plaintiff *a quo*) with costs. The appellants attacked the decision of the court *a quo* on two grounds. The first was that the court had erred in not finding that the appellants were purchasers of Share Number 24. The second was that the court *a quo* erred in failing to find that the balance of equities weighed heavily in favour of the appellants.

[20] In their heads of arguments, the appellants have submitted that the court *a quo* erred in failing to find that this was a double sale involving both Share Number 10 and Share Number 24. That having been the position, the court should have simply determined who, between the respondent and the appellants, the equities favoured. There was no basis for the conclusion that they were not innocent purchasers taking into account that only Maffack had exclusive knowledge of the status of each of the units. The court *a quo* had also failed to take into account that the appellants had established a home on the property and had expended considerable amounts on its improvement.

[21] The respondent, at the hearing of the matter before us, conceded that Maffack had indeed sold the property to two purchasers including her and that the principles that apply to a double sale come into play in this matter. She was the first purchaser and, in the absence

of equities in favour of the appellants, she is entitled to specific performance and would therefore be entitled to retain the property. It was submitted on her behalf that there were no such equities in favour of the appellants.

ISSUES FOR DETERMINATION

[22] In view of the concession by the respondent that there was a double sale of Share Number 24 to both the respondent and the appellants, only two issues remain for determination. The first is whether the court *a quo* correctly found that the appellants were not innocent purchasers. The second is whether the court *a quo* correctly found that there were no equities in their favour.

[23] It bears mention at this stage that the concession by the respondent on the existence of a double sale was properly made. The fact of the matter is that Maffack was the legal entity in control of the units. Having sold Share Number 10 to two persons, it decided to "vary" the agreement with the appellants in order to substitute Share Number 24 for Share No. 10. When it did so, it had not terminated the agreement with the respondent. Both the respondent and appellants ended up with competing claims in respect of Share Number 24. There can be little doubt on these facts that a double sale did take place.

WHETHER THE COURT A QUO PROPERLY CONCLUDED THAT THE APPELLANTS WERE NOT INNOCENT PURCHASERS

[24] It was the finding by the court *a quo* that the appellants were not innocent purchasers because they had deliberately refrained from knowing the exact status of Share 24 before

accepting it from Maffack. This was a finding of fact. That finding was not consistent with the totality of the evidence. It is correct that the appellants had initially purchased Share Number 10. They had complied with the request for them to pay additional sums of money to Maffack, the developer. It was Maffack which decided to substitute Share Number 24 for Share Number 10. Maffack, as the developer, was in complete control of the project. Its explanation to the appellants was that Share Number 10 had been sold to a third party who had already performed in terms of the agreement and that, in place of Share Number 10, the appellants were to be allocated Share Number 24 on the same terms and conditions as for Share Number 10. Indeed, a "variation" agreement to that effect was prepared by Maffack and signed by both parties.

[25] The evidence adduced before the court *a quo* revealed clearly that the appellants had no access to the records kept by Maffack on the sale agreements entered into by Maffack in respect of the thirty units that comprised this cluster development. This was an undeveloped piece of land. They had no way of ascertaining whether there was another purchaser who had a claim to the same piece of land. Indeed, when the respondent (plaintiff *a quo)* was asked during cross-examination whether the appellants would have been aware of her pre-existing claim to the same property, her response was that she could not say as she only met them in 2010. The conclusion by the court *a quo* that they were not innocent purchasers was therefore reached on no evidence and was clearly a misdirection. The finding was irrational and stands to be set aside – *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S), 670 C-E.

THE LAW ON DOUBLE/SUCCESSIVE SALES

[26] Construction work on Share Number 24, like that on the other units that constituted the Monavale Cluster Homes, was still to take place. Only after satisfying the requirements of the development permit would transfer of title to the individual purchasers have been effected. Both the respondent and the appellants had no real rights to Share Number 24. The doctrine of notice as it applies to double or successive sales where transfer has taken place, though not materially different, is therefore of no particular relevance to this case.

[27] In *Crundall Brothers (Pvt) Ltd v Lazarus N.O & Another* 1991 (2) ZLR 125(S), 132G-133A-B this Court cited with approval the remarks of the late Professor R G McKerron in an article which appeared under the title "*Purchaser with Notice*" in the 1935 South African Law Times that:

> "Where A sells a piece of land first to B and then to C – and the position is the same *mutatis mutandis* in the case of a sale of a movable of which the court would decree specific performance – the rights of the parties are as follows:-
>
> (1) Where transfer has been passed to B, B acquires an indefeasible right, and C's only remedy is an action for damages against A.
>
> (2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A.
>
> If, however, C had knowledge at either of these dates, B, in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event C's only remedy is an action for damages against A.
>
> *(3)* Where transfer has been passed to neither, B, in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance of the contract, and in the event, C's only remedy is an action for damages against A." (*underlining for emphasis)*

[28] The above principle was restated by the Rhodesian General Division of the High Court in *BP Southern Africa (Pty) Limited v Desden Properties (Pvt) Ltd and Anor* 1964 RLR 7 (G), II H-1; 1964 (2) SA 21, 25 G-H as follows:

> "…… the policy of the law to uphold the sanctity of contracts will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Prof McKerron, that save in "special circumstances", the first purchaser is to be preferred."

[29] This Court has, in a number of subsequent decisions, affirmed the above position. More specifically, in *Guga v Moyo and Others* 2000 (2) ZLR 458 (S) at p 459E, this Court remarked:

> "The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller which is usually small comfort. But that rule applies only "in the absence of special circumstances affecting the balance of equities." …*Burchell* was of the view that "the balance of equities must weigh heavily in favour of the second purchaser" before the court could favour her over the first purchaser."

[30] The above principle is derived from the policy of the law to uphold the sanctity of contracts – *Mwayipaida Family Trust v Madoroba and Ors* 2004 (1) ZLR 439 (S), 443. A court of law should, as far as possible, in matters of this kind, adopt an approach which will discourage sellers from entering into contracts the performance of which will necessarily involve a breach of an earlier contract and by adopting such an approach reduce a potential cause of hardship. The concern of the courts should primarily be with the removal of the cause of these hardships rather than with the result in a particular case – *Select South African Legal Problems, Essays in Memory of R.G. McKerron by Ellison Kahn*. It is clear therefore that the second purchaser must establish a preponderance of equities in his favour or

circumstances which render it inequitable to apply the maxim *qui prior est tempore potior est jure* before the court can favour him/her over the first purchaser – *Barros and Anor v Chimphonda* 1999 (1) ZLR 58 (S).

WHAT CONSTITUTES THE "BALANCE OF EQUITIES"

[31] What constitutes the balance of equities is incapable of a precise definition but what is clear from the application of the principle in various cases is that the totality of the proved facts must establish special circumstances which would render it inequitable to apply the *qui prior est tempore potior est jure* maxim. In simple terms the maxim means that he who is first in time is first in right or one who is prior in time has a superior right in law. In the absence of such equities the first purchaser would have a right to the remedy of specific performance. Whether the established facts constitute a balance of equities involves the exercise of discretion on the part of the trial court.

[32] Some of the considerations taken into account by the courts in this country include the following:

- That the second purchaser was an innocent purchaser.
- That the first purchaser had failed to register a *caveat* against the property although she had become aware that the seller was exhibiting intentions to sell the property to another person.
- That the second purchaser had expended more money overally than the first purchaser.

- That the second purchaser was already in lawful occupation and the first was not – *Guga v Moyo, supra at* 460 C-E.
- That the second purchaser had demonstrated more zeal and enthusiasm towards developing the property as required by the local authorities whereas the first purchaser had not done anything despite having purchased the property – *Dube v Mpala and Ors HB* 116/05
- That one of the competing purchasers had stayed at the property for a long time and had paid all the charges levied by Council on the property - *Ndidzano v Gondora* and Ors HH 65/2011.

WHETHER THE BALANCE OF EQUITIES FAVOURED THE APPELLANTS

[33] This was the crux of the matter. In addition to the improper finding that the appellants were not innocent purchasers, there were a number of weighty considerations in favour of the appellants that the court *a quo* simply failed to take into account. As at the date of the handing down of judgment by the court *a quo* on 18 January 2018, the appellants had been in occupation of the property for almost nine years. They remain in occupation to this date. Although the prefabricated structure they erected on the property was not a permanent structure, it nevertheless demonstrated their intention to regard the structure as their place of shelter. They dug a well on the stand and caused ZESA to install electricity on the stand for which they had to pay an amount of well over us$1000.00.

[34] It was common cause in the court *a quo* that Maffack experienced serious financial constraints and was unable to proceed with the construction work at the site. This was at the

height of the inflationary environment that wiped out savings in a short period of time. Maffack therefore proceeded to invite the individual owners of the units to contribute the sum of Z$36 billion each in order to bring the project back on track. Maffack made it clear that if this was not accepted by individual purchasers, they would be refunded the purchase price, less forty percent. It is without doubt that when Maffack made this proposal, it had no basis in law for doing so. But that is really of no moment. Given the imbroglio occasioned by Maffack, the appellants and the other purchasers cannot be faulted for deciding to save their properties and paying the Z$36 billion demanded by Maffack. The respondent refused, stating that she would hold Maffack to the terms of the agreement of sale. Even then the sum of Z$36 billion paid by each of the purchasers was not sufficient to see the development through. Faced with this difficulty, the purchasers, who included the appellants, formed an association to take over the construction work that Maffack was no longer in a position to complete. Each member of the association paid US$100 as a joining fee and a monthly contribution of US$50.00. It was the evidence of Mr Mafuta that, as a result of the formation of the Residents Association and the additional amounts that the members and the association raised, sewer and water reticulation had been completed and construction of the driveways was awaiting the end of the rainy season.

[35] It is clear from all the evidence led in the court *a quo* that Maffack was in financial dire straits and that it was prepared to unilaterally terminate sale agreements and introduce new purchasers who could afford to pay not just the original purchase price but also the top up. In all probability Share Number 24 would have been disposed of to another purchaser by Maffack had the appellants not agreed to pay additional amounts to save the stand.

[36] The court *a quo* failed to take into account that the appellants had done more than just pay the purchase price. Together with the other purchasers, they had contributed additional funds to save the project and ensure that it continued on track. Indeed, it was not disputed that considerable work had been undertaken on the cluster site following the additional payments made by purchasers. The court also failed to pay due regard to the fact that, in addition, the appellants regarded the stand as their home and that they had been in occupation for a considerable period of time. They remain in occupation to this date. The same could not be said of the respondent. Having paid the purchase price in 2006, she had no further dealings with the property other than to institute proceedings for the eviction of the appellants in August 2012.

[37] I am satisfied that there was an improper exercise of discretion on the part of the trial court in that it failed to take into account a number of relevant considerations, already referred to, in coming to the conclusion that the equities did not favour the appellants. The equities clearly favoured the appellants. I am aware that it is not enough that this Court considers that, had it been in the position of the High Court, it would have taken a different course. As stated in *Barros and Anor v Chimphonda*, *supra*, to justify interference:-

> "It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant considerations, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always that it has the material for so doing…" (at p 62F – 63A).

[38] When all is said and done, the conclusion is inescapable that the court *a quo* did not exercise its discretion judiciously. Its conclusion on the balance of equities must therefore be set aside.

DISPOSITION

[39] The finding by the court *a quo* that the appellants were not innocent purchasers was not supported by the evidence. The court *a quo* also failed to take account of a number of considerations that clearly established a preponderance of equities in favour of the appellants. In the circumstances, the appeal must therefore succeed.

[40] On the issue of costs, in accordance with the normal approach of this Court, these follow the event. No case for an award of costs on the higher scale, which was prayed for in the notice of appeal, has been made.

[41] In the result, the following order is made:

1) The appeal succeeds with costs.
2) The judgment of the court *a quo* is set aside and in its place the following is substituted:-

"The plaintiff's claim be and is hereby dismissed with costs."

PATEL JA **:** I agree

BERE JA **:** (No longer in office)

Lovemore Madhuku Lawyers, appellants' legal practitioners

Sinyoro & Partners, respondent's legal practitioners