DEXPRINT INVESTMENTS
versus
ACE PROPERTY & INVESTMENTS (PRIVATE) LIMITED
and
PAULINE DOROTHY HARDY
and
VALUEQUEST INVESTMENTS HOLDING (PRIVATE) LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
KARWI J
HARARE, 13 February 2003 and 28 January 2004

Opposed Matter

Mr *Chikumbirike,* for the applicant
Mr *Chinake,* for the respondents

KARWI J: This is an opposed application in which applicant is seeking the following order in terms of its draft order:

"(a) That there be a declarutur that the contract between Applicant and 1st Respondent is valid and subsisting.

(b) That the contract between 3rd Respondent and 1st Respondent be and is hereby declared of no force and effect.

(c) That the transfer of shares by 1st Respondent to 3rd Respondent in Carey Farm (Pvt) be and is hereby set aside.

(d) That 1st and 2nd Respondents be and hereby ordered that within 7 days of date of this order being served upon them or their legal practitioners, they take all steps necessary to effect transfer of the shares of Carey Farm (Pvt) in terms of the agreement between 1st Respondent and Applicant, failing which the Deputy Sheriff be and is hereby ordered to take all steps necessary to effect the transfer of the shares in terms of the agreement between 1st Respondent and Applicant.

(e) That all respondents be made to pay costs of this application on the legal practitioner and client scale.

The facts of the matter are that applicant purchased shares from the first respondent in respect of a company known as Carey Farm (Private) Limited in terms of a written agreement, on the 5th February 2002. The contract price of the shares was $140 000 000 (one hundred and forty million dollars). The agreement was that before the signing of the agreement applicant was to pay an amount of $14 789 000 (fourteen million seven hundred and eighty-nine dollars). Upon execution of the agreement applicant was to pay a

further $56 208 000-00. The balance of $69 000 000 together with interest of 5% per month from the date the contract was signed, was to be paid by 28th February 2002. Carey Farm (Pvt) Ltd's only asset on the effective date, is one miserable property called the Reminder of Lot H of Borrowdale Estate situated in the District of Salisbury measuring 89,2623 hectares, which property is commonly known as Herons Gill farm held under Deed of Transfer No. 2844/90 dated 23rd April 1990.

It is common cause that the applicant fell into arrears as he had not paid the amount of $56 208 000 on the date of agreement of sale was signed. It is also common cause that on the 28th February 2002, first respondent allegedly cancelled the agreement of sale on the grounds that applicant had failed to meet the terms and conditions of the agreement. In particular, that applicant had failed to pay $56 208 000 and $69 000 00 on due dates. First respondent addressed applicant to that effect on 28th February 2002 after giving notice through a letter dated 13th February 2002. The letter of the 28th February 2002 also indicated that "… the sale if hereby cancelled. The seller is seeking an alternative purchaser who is willing and able to purchase the property." The property was indeed sold to third respondent on 1st March 2002, a day after the purported cancellation f the agreement of sale. It is my understanding that transfer into third respondent's name has already been effected.

It is clear from the papers that applicant also seeks an alternative relief in that, in the event that this court is not able to grant the main relief sought, the applicant seeks a declarater as against the first and second respondents, that they are in breach of the agreement and that the matter be referred to trial for the applicant to prove its damages following upon the breach of contract.

Clause 10 of the Memorandum of Agreement provides that:

> "If either party shall be in breach of this agreement, including in the case of the Purchaser, its failure to pay any part of the purchase price, the other party may give to the party in breach, notice in writing to remedy such breach and if the party in breach shall fail to remedy such breach within fourteen (14) days the party which has given the notice shall be entitled to its option either to cancel this agreement, and in the case of the seller to resume possession of the property, without prejudice to its rights to recover damages from the party in default which party may have sustained by reason of the breach or cancellation of this agreement."

On the 13th February 21002 first respondent hand delivered a letter to applicant in which he wrote, *inter alia,*

> "We are instructed that notwithstanding the above provision that the sum of Z$56 208 000 was payable by your company on the date of execution of the agreement, the sum has not yet been paid and therefore your company, the Purchaser and is already in breach of the agreement. We have been instructed as we hereby do in terms of Clause 10 of the Agreement to give you 14(Fourteen) days notice to remedy that breach from today's date. Accordingly, if Z$56 208 000 and the costs are not paid with 14 (Fourteen) days and Z$69 000 000 plus interest is not paid by the 28th February 2002 our client reserves the right forthwith and without giving further notice to you to cancel the agreement."

The letter was hand delivered to applicant's representatives.

On the afternoon of 28th February 2002 first respondent through its legal practitioners addressed to the applicant in a letter of the same date in which they stated as follows:

> "We refer to our letter dated the 13th February 2002 which was delivered to you on the same date. The notice period of 14 days expired at midnight on the 27th February 2002 but the installment referred to in our letter was not paid by then. …. We are accordingly advising you that in terms of Clause 10.2 of the Agreement, the sale is hereby cancelled."

Clause 12 of the agreement of sale provides amongst other things, that –

> "Any notice left by hand shall be deemed to have been received within 12 (twelve) hours after it has been delivered and any notice posted by pre-paid post shall be deemed to have been received within 72 (seventy-two) hours from the time of posting, provided that such periods shall be calculated subject to the exclusion of Saturdays, Sundays and Public Holidays."

The question I have to decide is whether or not adequate notice (in terms of the agreement of sale) was given by the first respondent to applicant before purporting to cancel the said agreement.

In casu, it is common cause that first respondent's letter dated 13th February 2002 was hand delivered to applicant at about 12.00 noon that day. The terms of Clause 10 of the agreement "if the party in breach shall fail to remedy such breach within fourteen (14) days, the party which has given the notice shall be entitled at its option either –

> "10.1 ….
>
> 10.2 to cancel this agreement summarily, and in the case of the Seller, to resume possession of the property, without prejudice to its rights to recover damages. …."

It is clear from the above that the letter can only be deemed to have been delivered after midnight on 14th February 2002.

It is from the midnight on the 14th February 2002 that the 14 days notice should start running. That notice period should exclude Saturdays, Sundays and public holidays. A perusal of the calendar showed that 16th and 17th February 22 were Saturday and Sunday respectively, and so were the 23rd and 24th. This would mean that the notice period expired at midnight on the 6th March 2002. This means that the first respondent's purported cancellation of the contract on the 28th February 2002 was of no force or effect as it was premature.

In its heads of argument, the applicant has dealt with issues pertaining to which agreement takes precedence over the other, that between the applicant and first respondent or that between first and third respondent. It is my view that that issue does not arise as long as the agreement between first respondent and applicant was breached. I find that the first respondent is in breach of the agreement of sale between it and applicant. The issue of the precedence of agreements becomes of no consequence.

In their heads of argument, first, second and third respondents took an objection *in limine,* in that this case is not properly before this court as the applicant is seeking substantially similar relief as in HC 5194/02. Respondents have therefore raised a plea in abatement of *lis alibi pendens.* The requirement s of this plea have been laid down in a number of cases including, *Mhungu v Mtindi* 1986 (2) ZLR 171 (SC) and *Nield v UDC Ltd* 1989 (2) Z:LR 142 (SC) as follows:

> "If an action is already pending between parties and the plaintiff therein brings another action against the same defendant on the same cause of action and in respect of the same subject matter, whether in the same or a different court, it is open to such defendant to take the objection of *lis alibi pendens,* that is another action respecting the identical subject matter has already been instituted, whereupon the court, in its discretion, may stay the second action pending the decision in the first action."

During the hearing of this matter, counsel for the applicant indicated that HC 5194/02 was formally withdrawn on 18th November 2002. Respondents' arguments had been that they had demanded in writing on 5th November 2002, that applicant makes a decision to withdraw HC 5194/02 by 11th November 2002, failing with the respondents would persist with the Plea in Abatement of *lis alibi pendens.* It is my view that since the matter was

withdrawn a week later, that issue must be put to rest, and allow a determination of the main dispute, on merits.

The respondents also argued that there was a dispute of fact which cannot be determined on the papers. They submitted that the matter be referred to trial with the applicant's founding affidavit to stand as the summons and the notice of opposition as the appearance to defend, after which the applicant is required to file its declaration and thereafter subsequent pleadings be filed in accordance with the Rules of this Court. I must say I do not find any dispute of facts in this matter. The matter is clearly capable of being resolved on the papers,. Respondents have failed to substantiate their claim that there is a dispute of facts.

In determining whether or not to grant the applicant 's main prayer, one must have regard to the fact that the agreement between the first respondent and the third respondents has been fully executed. All the payments have been made and transfer has been effected.

Having found that the first respondent breached the agreement of sale between it and applicant, it is ordered that the issue of damages for the breach of contract be and is hereby referred to trial.

Chikumbirike & Associates, applicant's legal practitioners.
Messrs Honey & Blanckenberg, 1st and 2nd respondents' legal practitioners.
Kantor & Immerman, 3rd respondent's legal practitioners.