JEALOUS MARIMUDZA
versus
MAFFACK PROPERTIES (PRIVATE) LIMITED
and
LOVEMORE MAFUTA
and
THE TRUSTEES OF B.S. LEON TRUST N.O.
and
WESTWINDS REALTY (PRIVATE) LIMITED
and
THE REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
KAMOCHA J
HARARE, 17 February 2006

Mr *G. Chikumbirike,* for the applicant
Mr *Bvekwa,* for the 1st and 2nd respondents
No appearance from 3rd, 4th and 5th respondents

Urgent Chamber Application

KAMOCHA J: After hearing submissions in argument from both legal practitioners I dismissed this application with costs on the ordinary scale and indicated that my written reasons would follow in due course. These are they.

On 27 September 2005 the applicant and the 1st respondent represented by the second respondent concluded on agreement of sale of an immovable property known as Stand 195 Monavale Township measuring 36953 square metres for a purchase price of seven billion dollars ($7 000 000 000 .00)

The mode of payment was cash which was to be made to the seller's legal practitioners, *Bvekwa Legal Practitioners* within thirty (30) days of signing of the agreement which would be released to the seller upon transfer.

The parties agreed that applicant could take occupation for the purpose of servicing the stands as the property had already been subdivided. The stands had been pegged and the whole area had been surveyed with stand numbers in place. The stands had already been defined and there were about 30 of them. The applicant was told not to sell any stands.

The applicant, however, did not heed that, instead he started advertising the stands shortly after that. Six days after signing the agreement of sale he advertised the stands for sale in the Sunday Mail of 2 October 2005. On seeing the advert in the press the 1st respondent's legal practitioner wrote to the applicant on 7 October 2005 in the following tone.

> "We note with great concern that you have started advertising for sale the stands in the above properties before purchase price is paid. This is evidenced by an advertisement in the Sunday Mail of 2 October 2005.
>
> Our client gave you occupation so that you could service which we believe was the only reason why you wanted occupation. There is no authority to sell the stands that have been granted by our client.
>
> Please immediately desist from so going until such time you get authority from our client or the full purchase price is paid. You can see the writer for clarification."

The applicant decided to engage the services of a legal practitioner after he had received the above letter. His legal practitioners *Chikumbirike and Associates* wrote to the respondent's legal practitioners stating the following:

> "We address you at the instance of Mr Jealous Marimudza who instructs us as follows:
>
> 1. That he entered into two agreements of sale with your above-named client in respect of two properties in Borrowdale.

2. The purchase price of both properties is supposed to be paid within thirty days of signing the agreement.

3. That he will deposit the purchase price with us prior to the due dates for onwards transmission to yourselves.

Accordingly, we kindly request you to forward all future correspondence in respect of the said transaction to ourselves.

Your usual co-operation will be appreciated."

The sale of stands by the applicant continued unabated and the defendant's legal practitioners had to write another letter to the applicant's legal practitioners on 18 October 2005 which they faxed. The letter reads:

> "We refer to your letter of 14 October, 2005. Our client was originally reluctant to give yours occupation until some conditions would have been met. Its fears are being vindicated
>
> Your client had promised to make piecemeal payments and indeed had promised to pay fifty percent of the money to us. He chose to have it guaranteed instead.
>
> So that we all follow the agreement's spirit to end, we ask that yours immediately stops all sales we understand he is making until such time he gets the authority or until he fully pays in terms of the agreement."

Needless to say the contents of the above letter also fell on deaf ears because the applicant still continued with the sale of the stands and at the same time failed to make any payment towards the purchase price. When the 30 days period lapsed the respondent's legal practitioners again wrote to the applicant's legal practitioners on 28 October 2005 in these terms:-

"We refer to the above matter and to your letter of 14 October 2005.

> Your client is in breach of agreement of sale in that he has failed to pay the purchase price within thirty (30) days in terms of the agreement of sale signed on 27 September 2003 between our client Maffack properties and him.
>
> As indicated in your letter of 14 October, 2005 we now write to you as his legal practitioners and the agency that will receive all correspondence to advise that by copy of this letter our client demands that yours remedies his breach by paying what is due in terms of the sale agreement within fourteen (14) days of the date of this letter failing which our client will exercise its rights in terms of the agreement of sale. We should mention that the best option to it would be to cancel the agreement and at the expiration of the fourteen (14) days it will do just, that should your client not complied (sic).
>
> Related to this we understand your client continues to sell the stands despite our earlier warning for him to desist from such contact (sic). During the fourteen (14) days period we will file press statements to warn the public against the purchase of stands from your client.
>
> For avoidance of doubt and to make sure that no issues arise thereafter we are copying this letter to your client advising him as well that he has already been put on this in terms of the sale agreement (sic). We are also copying this letter to the Estate Agency he has engaged to sell the stands."

The fourteen day deadline came and went without the applicant remedying the breach prompting the respondent's legal practitioner to write to the applicant's legal practitioners on 14 November 2005, pointing out that the applicant had not remedied his breach.

In the result, the agreement had been cancelled and the respondent would exercise its rights in terms of the said agreement especially of possession.

On the same day *id est* 14 November 2005 the applicants' legal practitioners also addressed the following letter to the respondent's legal practitioners.

> "Your letter dated 28 October 2005 refers. Our client advises that to date he has not received your client's notice in terms of clause 9 of the agreement. The notice has not been served on his *domicilium citandi et executandi*,

> *therefore* remains invalid. The letter addressed to you by ourselves dated 14 October 2005 does not seek to vary the agreement as clause 13:3 is quite explicit that any variation to the agreement should be in writing and signed by both parties. The letter is not by any stretch of imagination, a notice in terms of the agreement. Could you therefore comply with the provisions of the Agreement."

A reading of the letter, calling upon the applicant to remedy the breach reveals that a copy of that letter was sent to the applicant and he was advised that, that letter served as a notice in terms of the sale agreement. It went on to warn him that it would be placing advertisements in the press.

The provisions of Clause 9 of the Agreement of Sale are couched thus:

> "9 NOTICES
>
> 9.1 The Seller and Purchaser hereby choose as their respective *domicilium citandi et executandi* for all purposes of this agreement their addresses set out in the schedule hereto or such other address or addresses as the parties may from time to time notify to the other in writing" Emphasis added.

On 14 October 2005 the applicant through its legal representatives notified respondent in writing that from then onwards all future correspondence in respect of the said transaction should be forwarded to its legal practitioners. It was just sheer dishonesty on the part of the applicant when he contended that the notice had not been served on his *domicolium citandi et executandi* and was by that reason invalid. Quite clearly the parties are permitted by clause 9 to use any other address or addresses provided the other party is notified in writing. This infact is what the applicant did by the letter of 14 October 2005.

The applicant also contended that he had raised the full purchase price of $7 billion which he offered to pay to the second respondent but he refused to accept it. He alleged that the offer to pay was made on 21 October 2005. The applicant was

being untruthful once more. That is so because if there was any truth in his story he would have paid it to his legal practitioners prior to the due date for onwards transmission to the defendant's legal practitioners as suggested in his letter of 14 October 2005. He could have paid it to the sellers" legal practitioners as stipulated by the agreement of sale. Better still, he could have paid it when a golden opportunity presented itself in the form of a notice to rectify the breach within 14 days.

It admits of no doubt that the applicant was in clear breach of the sale agreement which breach he failed to remedy thereby entitling the respondent to cancel the agreement.

In the result, it is ordered that the application be and is hereby dismissed with costs.

Chikumbirike and Associates, applicant's legal practitioners
Bvekwa Legal Practitioners, 1st and 2nd respondent's legal practitioners