SIZE MAVUTO
versus
PAUL GOSTINO
and
PROMENADE REAL ESTATE
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 25 June 2010 and 28 July 2010

Opposed Court Application

C Chinyama and *M D Hungwe*, for the applicant
Miss *N P Goneso*, for the first respondent
No appearance for the second and third respondents

GOWORA J: The first respondent is the registered owner of an immovable property known as Lot 2 of Lot 20A Waterfalls Induna which is 4195 square metres in extent. On 25 August 2008 the first respondent gave a mandate to the second respondent to dispose of the property on his behalf. The second respondent is a registered estate agent. It seems as if the second respondent already had buyers on its books for a property such as the first respondent had on offer, because on 26 August 2008 an offer was received from the applicant for the purchase of the property. The offer, which was in writing, was for the sum of $225 000 000-00 Zimbabwe dollars. The applicant signed the offer form. The first respondent's signature does not appear on the document. The applicant contends that his offer was accepted by the first respondent and that an oral agreement was thereby concluded between the parties which agreement was subsequently reduced to writing and that he had signed it but the first respondent had not. The applicant further contends that notwithstanding the refusal by the first respondent to sign the written agreement, the parties did conclude an agreement and he wished for the terms to be put into effect by the first respondent being ordered to effect transfer of the property to himself. The first respondent denies the existence of an agreement between him and the applicant and consequently prays for a dismissal of the application.

The applicant contends that he had initially made an offer of $150 000 000-00 for the property which had subsequently been increased to $225 000 000-00. On 26 August 2008

subsequent to the second offer he and the first respondent had met and concluded an oral agreement for the sale of the property at a price of $225 000 000-00. A written agreement was prepared but the first respondent refused to sign it alleging that the purchase price had been hit by inflation. The first respondent had apparently wished to purchase an amount of US dollars from the purchase price. Despite that attitude of the first respondent to the agreement, it would appear that the applicant had no misgivings about the contract and proceeded to make a payment for the purchase of the property.

The first issue for determination is whether in fact an agreement of sale was concluded between the parties. There is no dispute that the first respondent gave a mandate to the second respondent to sell his immovable property. The applicant made two written offers, which he signed. The first respondent did not sign either. The two offers were made a day within each other, with both being made within twenty four hours of the property having been placed on the market. On the same day that the second written offer was made an amount of money corresponding to the offer made by the applicant is alleged to have been paid as the purchase price for the property. It is also the same day that a written agreement was allegedly drawn up for signature by the parties. The agreement was signed by the applicant and one other as purchasers but it is not dated. It is not disputed that the first respondent refused to sign the agreement. Although the written agreement is part of the documentation produced by the applicant it is the alleged oral agreement that the applicant wishes the court to uphold and issue in consequence an order for specific performance against the first respondent.

It is a general principle of our law that for a contract to be said to exist, there must be a true agreement, a meeting of the minds by the parties which is a position arrived at after acceptance by one party of the other party's offer. Where an offer has been made the acceptance must be clear and unequivocal so as to leave no reasonable doubt in the offeror's mind that his offer has been accepted. See *Christie Business Law in Zimbabwe* 2nd ed p42.

It is submitted on behalf of the first respondent that for a court to decide whether there was a meeting of the minds the court must decide the state of mind of the parties as manifested by word or deed and not in the abstract. I think this is a correct statement of the law. In order to decide on whether there was a meeting of the minds I have to examine the documents produced by the parties in the application in relation to the conduct of the parties as regards the

alleged agreement. It is therefore necessary to examine the manner in which the alleged agreement was made.

The first is the offer made by the applicant, which bears the signature of the applicant only. Although the applicant alluded to an initial offer of $150 000-00 that offer has not been produced herein. The only one produced is that one for $225 000-00. It is however common cause that an offer was made. The second offer is the one which is the subject matter of this dispute. The offer would appear to have been made on 26 August 2008, which is the day when all the events seem to have occurred. According to the applicant, the parties had met at the offices of the second respondent and the agreement reached on the purchase price. The suggestion by the applicant is that he made the written offer after he and the first respondent had met and agreed on the purchase price. One would assume then that the first respondent would have signed the offer form in acceptance of the offer. He did not. A payment was then made on the same day. There is no explanation from the applicant as to when precisely the payment was made when regard is had to the events enfolding on the day in question doubt is cast as to where precisely the parties were when the offer was made and accepted. An offer was made which the applicant signed but the first respondent did not. It seems then that a written agreement was prepared again on the same day but the first respondent again refused to sign on the basis that the money had been eroded by inflation.

It is difficult to accept that the first respondent would accept an oral offer of $225 000 000-00, refuse to accept the formal offer by signing and then on the same day refuse to accept the written offer and again refuse to sign the agreement of sale on that day on the grounds that the money would have been eroded by inflationary forces. Yet if the applicant is to be believed the parties had met at the second respondent's offices where agreement was reached on the purchase price resulting in the written agreement being prepared. Even in an inflationary environment as existed then, it would be hard to imagine the value of money being so subjected by inflation within a few hours as to render a business transaction unattractive. The first respondent had put up his house for sale and if he received an offer he thought worthwhile one would naturally assume he would accept, especially as payment in this instance appeared to be instant. If they were both at the second respondent's offices as events unfolded why would the first respondent refuse to sign the offer form or the agreement of sale.

The applicant's answering affidavit appears to shed light on the actual circumstances of the alleged agreement. In para 6 thereof the applicant avers that he had sat down with the second respondent and had agreed on a purchase price and the mode of payment. He had then paid to the second respondent as agent for the first respondent. He avers that the agreement was brokered by the second respondent at his offices. This, in my view, lends credence to the denial by the first respondent of the existence of an agreement of sale in respect of the immovable property in question.

I turn now to consider the issue of payment. The applicant contends that payment was effected through the RTGS system and that this was in terms of the agreement. Both the applicant and the second respondent aver in their respective affidavits that it was one of the conditions of the oral agreement of sale that payment of the purchase price would be effected into the second respondent's account through the system referred to above. As part of his papers the applicant has annexed an application form for payment by the RTGS system. The beneficiary's name is that of Apple Tree Holdings Private Limited, whilst the applicant is described as Global Gifts and Concepts Private Limited. These names bear no relationship to the parties appearing before me and no explanation has been proffered on how these documents appear to be on the record.

The first respondent has taken the point, rightly so in my view, that there is no proof of payment into the second respondent's account. Even if payment had been so effected, payment, according to the first respondent, was accepted by the second respondent and not himself. It not infrequently happens that in the sale of immovable property, the purchase price is paid by the purchaser to the estate agent handling the sale. The vexed question of whose agent such estate agent is in holding the purchase price has come before these courts time and time and time again. In *Frazer NO* v *Ruwisi*[1] KORSAH JA had this to say:

> "I think this issue of a receipt of a deposit from a buyer was succinctly dealt with by WATERMEYER J in *Earlie Homes Estates* v *Miller* 1977 (4) SA 288 (C) at 290C-E, where the learned judge said:
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> > 'In my view the estate agent, unless he is the agent of the seller to receive the purchase price which, in the absence of express or implied authority, he is not (see *Tank* v *Jacobs*, 1SC 289; *Wessels* v *De Villiers*, 1 G 141 (1885 OFS 141) *Field & Co* v *Marks & Co*, 12 EDC 13; *Roberts* v *Bryer Bros* 1931 OPD 197; *Burt* v *Claude Cousins & Co Ltd* (1971) 2 All ER 611 at 615-618; and *Sorrel* v

[1] 1990 (2) ZLR 99 (SC)

> *Finch* (1967) 2 All ER 371) must hold the deposit for the would-be purchaser. Until such time as the contract of sale is completed the would be purchaser can call upon the estate agent to return the money, but if the contract is completed then the estate agent is bound to deal with the deposit in terms of the contract of sale.'"

Sometimes an estate agent is authorized to accept payment from the buyer of a deposit against the purchase price. In this case he would be acting in the capacity of agent for the seller. However in most instances the estate agent acts as a broker in which case he holds the deposit as agent for both parties and the deposit or purchase price remains vested in the purchaser until transfer is effected to the buyer and thereupon ownership passes to the seller. The applicant has sought to argue that payment of $225 000-00 was in terms of the oral agreement deposited into the account of the second respondent's by RTGS on the instructions of the first respondent. The applicant however contends that the payment was accepted by the second respondent in its capacity as an agent for the first respondent.

On 1 September 2008 LT Chitsaka, the Chief Executive Officer of the second respondent, made an electronic transfer of $38 884-00 to Global Gifts & Concepts P/L which is the name of the account in whose favour the deposit of $225 000-00 had been made. Again on the same day Apple Tree Holdings which had been named as the beneficiary into whose account the $225 000-00 had been deposited into made an electronic transfer into the account of Global Gifts & Concepts of an amount of $146 900-00. On 15 September 2008 LT Chitsaka, who handled the transactions on the sale, deposed to an affidavit wherein he narrated his part in the whole saga. He does not favour the court with the reason why the first respondent, having insisted on a purchase price of $225 000-00, had not signed the offer form in the sum suggested by him. He also states that he prepared an agreement for signature by the parties but again does not explain when exactly the agreement was prepared and further, why the first respondent did not sign the same. More importantly, he fails to explain how the money came to be deposited into an account over which he had control given the refusal or disinclination by the first respondent to sign any of the documents. This account is not in the name of the second respondent, the estate agent for the sale and purchase of the immovable property. He states that has returned the money yet in his affidavit he contends that he is holding onto the money on behalf of the first respondent. He states that he has asked the first respondent to take the money. This is not true. The second respondent apparently tried to

return the money as the Annexures G1 and G2 show. He does not explain why he attempted to return the money to the purchaser barely four days after the transaction had been concluded. He has omitted to tell this important fact and the reason why the money was returned. In my view he is not being candid with the court.

What I find significant is that nowhere in his two affidavits does he categorically state that the first respondent mandated him to conclude an agreement and accept the purchase price. The acceptance of a purchase price by an estate agent does not categorically point to the principal having given the estate agent a mandate to conclude the agreement on his behalf. He in fact says that the parties concluded an oral agreement which he then reduced to writing. In an affidavit filed by him under case number HC 4617/08 which was an application brought by the first respondent for a declaratur that the alleged agreement was null and void, Lawrence Chitsaka does make an averment in his opposing affidavit that an agreement was concluded for $150 000-00 and that it was a term of that oral agreement that cash be deposited in accounts were he had signing powers to facilitate the withdrawal by him of cash so that the first respondent would be better able to access cash to purchase foreign currency on the black market. It is in this affidavit that he states he was mandated by the seller to conclude an agreement of sale on his behalf. In *casu* however, the first respondent specifically denied ever giving the estate agent the mandate to conclude the sale and questions how the money was deposited into the second respondent's accounts. The estate agent did not specifically address the matters raised by the seller or how the money came to be deposited in the accounts in question. The applicant's legal practitioners have not been able, in the heads of argument or even in submissions in court, to fully explain why payment was made into the accounts in question or why there was an attempt on the part of the estate agent to refund the money to the purchaser.

The mode of payment of the purchase price would be one of the terms that the parties would have agreed upon when concluding the agreement of sale. The applicant relies on an oral agreement and it is harder to establish agreed terms when relying on an oral agreement. In this instance the applicant has not been able to establish on the papers what the parties had agreed to in relation to the payment. Other conditions including vacant possession, transfer and other requirements to the sale of an immovable property have not even been mentioned. If the parties concluded an oral agreement as is averred by the applicant, then it was incumbent upon

the applicant to establish the terms of that agreement and further that he as purchaser had complied with the terms agreed to by the parties. The applicant has not established such terms.

In the premises I find that the applicant has not established his claim and the application for specific performance is dismissed with costs.

Chinyama & Partners, applicant's legal practitioners
Munangati & Associates, first respondent's legal practitioners