LASAGNE INVESTMENTS (PVT) LTD
and
SAMMS OMAR
and
FEROZA OMAR
versus
HIGHDON INVESTMENTS (PVT) LTD
and
MEADOWRIDGE INVESTMENTS (PVT) LTD
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 1 September 2010.

L Uriri, for the applicants
L Mazonde, for the respondents

GOWORA J: On 22 May 2008, after hearing counsel, I dismissed this application with costs. I am now informed that reasons for the dismissal are required, the reason being that the parties hereto or other parties with an interest in the subject matter of the application are engaged in a legal wrangle and the judge dealing with the matter required my reasons. These are they.

Before I get into the dispute between the parties, it is necessary to lay out the history behind it. On 31 July 2001 Aluminium Industries Ltd sold to the applicant an immovable property described as Stand 23 Reitfontein Township of Lot 2 of 7B Reitfontein, otherwise known as I Kudu Close, Highlands. The purchase price according to the written agreement of sale, a copy of which is attached to the applicants' papers, was the sum of $4,2 million Zimbabwe dollars. The applicant avers that it paid the purchase price in South African rand and has attached documents which seem to confirm such payment. The sale does not seem to have been given effect to as the property was then sold and real rights transferred to the first respondent herein. In an effort to recoup their investments the applicants would appear to have entered into negotiations with the first respondent to secure title to the property. Before me the applicants sought relief in terms of a draft order worded as follows:

IT IS ORDERED THAT:

a) The purported transfer of Stand no 23 Reitfontein Township of Lot 2 of 7B Reitfontein in favour of the Second respondent be and is hereby set aside.

b) The title deed held in the name of the second respondent under Deed of Transfer no 3600/06 for Stand no 23 Reitfontein Township of Lot 2 of 7B Reitfontein be and is hereby cancelled

c) The first respondent be and is hereby ordered to take all steps and sign all documents necessary to effect transfer of Stand no 23 Reitfontein Township to the applicants or their nominee within seven (7) days of the granting of this order, failing which the Deputy Sheriff be and is hereby authorized to sign all documents necessary to effect transfer in favour of the applicants or their nominee

d) Costs of suit

Although there are three applicants the only affidavit to the founding papers was that of the second applicant, the third applicant only filing a supporting affidavit to the answering affidavit filed by the second applicant. In the founding affidavit, the second applicant lays out the background behind the dispute. He confirms that there had been agreement concluded with Aluminium Industries but that the dispute had spilled into court and before the dispute could be determined the property had been sold to the first respondent. Transfer to the first respondent had been effected which had then sued for the eviction of the first applicant from the premises in question. The matter was then referred to a judge for the holding of a pre-trial conference.

The applicant alleges that at the hearing the judge had directed that the two pending matters be consolidated and heard together. I am of the view that whatever the learned judge recommended is not the issue as the litigants did not seek to have the two matters consolidated. In the event, the applicants, decided to engage the first respondent for the acquisition of rights in the property which is the subject matter of this dispute. Through the exchange of correspondence the parties were able to conclude an agreement which has led to this impasse between the parties. The terms of the agreement between the parties are not in dispute but it would be more convenient to discuss them when dealing with the alleged breach by the applicants.

Having set out the facts which are not in dispute I believe it would be practicable to determine the dispute under the respective heads of issues raised by the parties in the heads of argument. In their heads of argument the applicants contend that the cancellation by the first respondent of the agreement between the parties was null and void as it was not effected in terms of the Act. Consequently, is further argued by the applicants, the tender of $5 billion by the applicants on 31st May 2006 was thus valid and constituted the final payment for the property which entitles the applicants to full transfer in favour of the first applicant. The heads of argument filed on behalf of the respondent did not touch on the alleged irregularity of the cancellation of the agreement of sale. For this two reasons can be found. The respondent's heads of argument were filed almost two and a half weeks before those of the applicants, but more importantly the issue of the cancellation of the agreement was not raised in the affidavits filed on behalf of the applicants. The mode of giving notice under the Act is provided for in subs 2 of s 8, which is to the following effect:

8 (1) No seller under an installment sale of land may, on account of any breach of contract by the purchaser-

a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
b) terminate the contract; or
c) institute any proceedings for damages;

unless he has given notice in terms of subs (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

Notice for the purposes of subsection (1) shall-

(a) be given in writing to the purchaser; and

(b) advise the purchaser of the breach concerned; and

(c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than-

(i) the period fixed for the purpose in the installment sale of the land concerned; or

(ii) thirty days; whichever is the longer period.

It seems to me that in order for the applicants to contend and argue on the basis of the illegality of the cancellation of the agreement it was necessary that they lay a foundation in their papers on the absence of the notice. That, to my mind, involved their setting out the manner in which the first respondent purported to cancel the agreement and to then invoke the provisions of s 8 of the Act the and aver that there was non compliance with the Act as regards the cancellation. They needed, in my view, to be candid with the court and state whether or not notice was given and how such notice then fell foul of the provisions of the Act. Instead, their papers are completely silent on the question of notice and the papers do not even refer to an alleged cancellation of the agreement by the first respondent. Letters on the cancellation were produced by the first respondent in an effort to show that by the time the tender of $5 billion was made, the agreement had been cancelled. The first respondent annexed to its papers an undated letter from its legal practitioners addressed to the second applicant and apparently received by the latter on 29 May 2006 returning a cheque in the sum of $1 billion dollars and confirming the cancellation of the agreement, which apparently the second applicant had been informed about. It is interesting to note that even though the first respondent specifically raised the issue of the cancellation of the agreement in the opposing affidavit, and attached documents to confirm the said cancellation, the applicants did not, in the answering affidavit comment on the cancellation or make any averment as to the irregularity of the said cancellation.

The way I read s 8 (2) is that the purchaser who seeks to rely on non compliance by the seller to the provisions of the Act, has to put facts before the court that establish that the seller did not comply with the provisions of the Act and thus the cancellation having been in contravention of the subsection would be of no force and effect. The applicants have not seen it necessary to place these facts before this court and it thus impossible for me to find that the cancellation was not in accord with the provisions of the Act.

In addition to this, it seems that the applicants in order to then succeed in their quest for specific performance of the contract and registration of real rights in favour of the first applicant or its nominee would have sought a declaratur to the effect that the cancellation be declared null and void and for a finding that the first respondent as a consequence was bound by the agreement and its terms. There is no such relief being sought. In the absence of such an order I cannot fathom how then as a court I can proceed to set aside the transfer to the second

respondent. A validation of the agreement of sale between the applicants and first respondent should be the precursor to an order for the setting aside of the agreement between the first and second respondent and in consequence thereof a reversal of the transfer. The applicants have not sought such relief. But I move on.

The applicants have contended that they have paid in full for the purchase price, whilst the first respondent states that the applicants were in breach, were advised of the breach and then paid an amount of $5 billion after the agreement had been cancelled and further after a cheque for $1 billion tendered by them had been returned on the basis of the breach and after the agreement had been cancelled.

The terms of the agreement recorded in a letter from the applicants' legal practitioners to a director of the first respondent lay out the following terms;

i) that the applicants would pay a sum of $2 billion on or before 28 February 2008'which payment was supposedly made and tendered; and

ii) that the balance of $5 billion would be payable in monthly installments, comprising of two payments of $1,5 billion each payable on 31 March and 28 April respectively and a final payment of $2 billion on 31 May 2008.

The first installment of $2 billion was paid by the applicants by way of a transfer to the first respondent's account with Standard Chartered Bank on 1 March 2006. The next payment that the applicants confirm on their papers as having paid is one for $5 billion, again through a bank transfer to the first respondent's Standard Chartered Bank account dated 31 May 2006. The conditions as recorded by the applicants through their legal practitioners were that an initial deposit of $2 billion would be made on 28 February with subsequent payments of $1.5 billion each on 31 March and 28 April and a final payment of $2 billion on 31 March 2006. That the applicants breached the terms and conditions of the agreement is not in doubt. The applicants despite their failure to abide by the conditions contend that they were not in breach as long as they paid by the last date set for the final payment and as a consequence of the payment demand an order for specific performance.

The applicants, when they embarked on this litigation, were fully aware that the first respondent had not only cancelled the agreement for alleged breaches, but that a payment through a cheque of $1 billion had been rejected on the basis that the agreement had been cancelled

An order for specific performance in favour of a litigant is entirely within the discretion of the judicial officer before whom the application has been made. An applicant who seeks an order or specific performance, must, perforce establish that he has complied with his obligations under the agreement.

Thus an applicant who seeks specific performance has an onus show that he is entitled to such an order in his favour. The leading case in our law is that of *Farmers Co-op Society (Reg) v Berry* 1912 AD 334 at 350 INNES CJ stated:

> "*Prima facie*, 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 party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson v Pullinger* (1894) 1 OR at p 301, the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt. It is true that courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec. 717(a)) 'it is against good conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it'. The election is rather with the injured party, subject to the discretion of the Court."

It is correct as submitted by the applicants, that although the discretion which the court enjoys must be exercised judicially, it is not confined to specific types of cases, nor is it prescribed by rigid rules. However, the court's discretion is exercised on a consideration of the facts of each particular case. Before I can consider whether or not I should exercise my discretion in favour of the applicants, it is in order to determine whether or not the applicants have in fact made out a case for the discretion to be exercised in their favour.

It is a well established principle in our law that in respect of bilateral contracts, a party who seeks specific performance must first fulfill or be ready and able to fulfill his own obligation. In *Wolpert v Steenkamp* 1917 AD 493 INNES C.J observed:

> "The contractual obligation of the seller was to hand over the business, deliver the stock and assign the lease; the contractual obligation of the buyer was to pass a bond to Niehaus in substitution of the one in existence, to take upon himself the liabilities of the lessee under the lease, and to make payment in cash of the difference between the valuation of the stock and the amount due to Niehaus. Now in a contract of purchase and sale, as in other bilateral

contracts, the party who seeks to enforce performance must first fulfill or be ready to fulfill his own obligations: see Voet, 19, 1, 23; Grotius, 3, 15, 3, notes, etc".

This principle was also laid out in *Lake v Reinsurance Corp Ltd* 1967 (3) 124 by GALGUT J thus:

> "This exception is based on the principle that a trustee who wishes to enforce a contract entered into prior to insolvency by the insolvent "cannot" demand performance of any remaining obligation under the contract by such other party, unless he himself tenders complete performance of all the insolvency's obligations, including unfulfilled past ones, under the contract". See *Tangney and Others v Zive's Trustee*, 1961 (1) S.A. 449 (W) at 453 and *Ward v Barrett, N.O. and Another* 1963 (2) S.A. 546 (A.D.) at 554. This principle is merely an extension of the principle applicable in all bilateral contracts, viz. that the party who seeks to enforce specific performance must first fulfill or be ready and able to fulfill his own obligations. See *Wolpert v Steenkamp*, 1917 A.D. 493 at p 499"

The first respondent has contended that the applicants were in default and as a result of the default the agreement was cancelled. Not only had the agreement been cancelled, the property had been sold to the second respondent which had immediately after the sale taken transfer of ownership in the property which is the subject matter of these proceedings. The situation that is before me is therefore that of a double sale.

The applicants have argued that the first and second respondents colluded against them in concluding the sale agreement and alleged that the directors in the two companies were the same. The applicants adduced no proof for the allegations. The applicants argue that due to the relationship between the respondents, the second respondent must have known of its prior agreement with the first respondent and therefore the second respondent took delivery with full knowledge of the first sale in order to defeat the applicants' rights. The applicants further contend that the transfer was clandestinely effected behind the applicants' backs only for this to be discovered on 31st May after paying the full purchase price. They argue that the second respondent is not a bona fide purchaser. The respondents contend that the directors are separate and there is no relationship between the two companies.

The leading case in our jurisdiction on the question of double sales is that of *Crundall Brothers* (*Pvt*) *Ltd* v *Lazarus NO & Anor* 1991 (2) ZLR 125 (SC). This was a judgment of the full bench of our Supreme Court. At 131D-G their Lordships observed:

> "… The real issue is whether, in a case of a double sale where the second purchaser takes transfer with notice of the first purchaser's rights, the court must order specific

> performance in favour of the first purchaser, or whether it has a discretion, or whether it is limited to an award of damages.
>
> The two cases a re clear enough. When the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed. Per contra, when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer, his real right can and normally will be overturned subject to considerations of practicality."

The applicants contend that it was for the respondents to show that the second respondent did not have notice of the first agreement of sale. Even though the allegation of notice on the part of the second respondent was averred by the applicants, the *onus* to disprove notice is laid on the respondents. The applicants did not cite any authority nor did the respondent find it necessary to advert to the legal position as to *onus*. In *M.B. Investments (Pvt) Ltd v Oliver & Ors* 1974 (1) RLR 169 MACDONALD A.C.J. at 174E-175A quoting with approval the dicta by GREENBERG J.A. in *Kriegler v Minitzer and Another* 1949 (4) A.A. 821 A.D. at p 823 stated:

> "In Phipson (supra at p 27), after a statement that the burden of proof……rests upon the party, whether plaintiff or defendant, who substantially asserts the affirmative of the issue".

It is added that the true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him.

In the appeal from the first of the two decisions cited in *Phipson (Abrath v North Eastern railway Company* (1) Q.B.D.440), which is reported in Vol II Appeal Cases at p 247, the passage from BOWEN L.J's judgment which is referred to by the learned judge is not dealt with as it was 'not seriously disputed' (see p 249) that in that case, which was a claim for damages for malicious prosecution, the burden of proving the negative, viz: that there was no reasonable and probable ground for the prosecution, lay upon the plaintiff. Professor Wigmore (supra, cit) summarily dismisses the contention that the rule is an absolute one. He says:

> "It is often said that the burden is upon the party having in form the affirmative allegations. But this is not an invariable test, nor even always a significant circumstance; the burden is often on the one who has a negative assertion to prove a common instance is that of a promise alleging non-performance of a contract".

A reading of the passage quoted above clearly shows that what is stated therein is an extraction of the principle to explain who the *onus* lay upon in the particular circumstances of the case before his lordship. The general principle regarding the burden of proof is simply stated as follows-he who avers must prove. The leading case is that of *Mobile Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) S.A. 706 A.D. at p 711 in which POTGIETER A.J.A said:

> "The general principle governing the determination of the incidence of onus is the one stated in the *Corpus Iuris*: *semper necessitas probandi incumbit illi qui agit* (D.22.3.21). In other words, he who seeks a remedy must prove the grounds therefore. There is, however, also another rule, namely, *ei incumbit probatio qui dicit non qui negat,* (D 22.3.2). That is to say the party who alleges or, as it is sometimes stated, the party who makes the positive allegations must prove. (*Kriegler v Minitzer and Another* 1949 (4) S.A. 821 (A.D.) at p 828. Together with these two rules must be read the following principle, namely, agree *etiam is videtur, qui exceptione utitur nam reus in exceptione actor est* (D. 44. 1.1.) This principle is stated thus by DAVIS A.J.A, in *Pillay v Krishna and Another* 1946 A.D.946 at p 952.
>
> "Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded, *quo ad* that defence, as being the claimant for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it"."

Looking at the manner in which the applicants presented their case, it leaps to the mind that a bald allegation was made that the two respondents are closely linked in terms of the directors who manage the affairs of each of the companies. It seems to me that the applicants are mistaken in their belief that it was not for them to establish that the respondents were closely linked and that therefore the agreement of sale between the two was entered into in order to frustrate the rights of the applicants. In my view, the applicants had the burden to establish, not just the alleged relationship, but also such other factors as would lead this court to conclude that the agreement was entered into by the second purchaser with the full knowledge that the applicants had concluded an agreement with the first respondent and that despite this, the second purchaser had then concluded its own agreement whereby the applicants were prejudiced of their rights in the *res venditi* as a result. Apart from allegations on the part of the applicant on the supposed nature of the relationship between the two and the conclusion therefore of fraud, there are no facts placed before me to substantiate the claims. In my view, the *onus* to establish the fraudulent nature of the relationship lay squarely upon the applicants but they have failed to discharge it.

The applicants have further argued that from the circumstances and manner in which transfer was effected it was done clandestinely behind the applicants back showing that there was connivance on the part of the first and second respondents. Based on the dicta in *Chimphonda v Rodrigues & Ors* 1997 (2) ZLR 63 (H), the applicants contend that, if the second buyer had knowledge of the first sale, either at the time of the sale or it took transfer of the property, then unless there are special circumstances affecting the balance of equities, the first buyer can recover the property from the second buyer who can then claim damages against the seller.

In my view the dicta in Chimphonda's case did not introduce any new principle that was not considered in Crundall's case. Regarding the alleged knowledge of the prior sale by the second respondent, in the founding affidavit the applicants averred that they had learnt with surprise of the transfer of the property to the second respondent "a company whose relationship with the first respondent is unclear. It is also suspected by the applicants that same is a shelf company owned by the first respondent or its management and the sole purpose of the transfer was to defeat the applicant's rights". Both respondents filed affidavits denying the existence of any relationship between them. In answer to those affidavits the applicants filed an even briefer affidavit and where it concerned the involvement of the second respondent this is what the applicants averred:

> "The applicants maintain that the transfer to the second respondent was clearly for the purpose of defeating the applicants' rights and for this reason applicants have since cause a caveat to be placed on the property." And later on they state:
>
> "The applicants persist with their claim that the second respondent has been conveniently used by the first respondent to defeat the applicants' rights. Therefore the title purportedly held by the second respondent over the property is not bona fide."

A perusal of those passages clearly shows that nowhere is it imputed or stated in precise terms that the second respondent ever had knowledge of the first sale, apart from a bald allegation that it was a shelf company wholly owned by the first respondent. In the answering affidavit it seems that it has been accepted that there is no relationship between the two companies and with that acceptance goes the allegation or imputation of notice of the first agreement on the part of the second respondent. It then does not assist for the applicants to seek to argue in the heads of argument that the second respondent had notice of the first

agreement of sale when the facts presented by the applicants themselves do not support such an argument.

The applicants, in the conduct of this case, appeared to be making their case based on the heads of argument and not on the papers filed. Legal argument has to be based on a sound factual basis as laid out in the papers. The case for the applicants on the evidence adduced in the affidavits does not establish that the second respondent ever had notice of the first agreement, either at the time the agreement was concluded or before it took transfer. What the applicants seek herein is to make the court rely on suspicions and suppositions. That is clearly not in order. They needed to prove notice of the agreement on the part of the second respondent. I therefore have to find that the second respondent was ignorant of the sale and as a consequence its real right in the property cannot be disturbed.

It is not necessary in view of the conclusion that I have reached to decide whether or there are special circumstances affecting the balance of equities. The question in my view, does not arise.

In the premises I find that the applicants have not made out a case for me to set aside the sale between the first and second respondents, and in consequence reversal of the transfer. The application is therefore dismissed with costs.

Mutamangira, Maja & Associates, applicants' legal practitioners
Chibune & Associates, respondents' legal practitioners

.