FOXCOTT ENTERPRISES (PVT) LTD
versus
FUNGAI TADIWA CHAPITA
and
ANDREW VHUKILE FIGUEIRO

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 22 June, 5, 6 and 14 June 2021

Opposed Application

P. Matsanura, for the applicant in main matter and respondent in counter application
R. Zimudzi, for the 1st & 2nd respondents in main matter and 1st &2nd applicants in counter application

CHIRAWU-MUGOMBA J: This matter was placed before me as an opposed application and a counter application. For the sake of consistency, the parties shall remain as cited in the main application.

The applicant seeks the following relief in the main application: -

1. That the 1st and 2nd respondents be and are hereby ordered to surrender the original title deed of transfer number 1188/11 to the applicant forthwith.
2. That the 1st and 2nd respondents be and are hereby ordered to pay costs of suit on a legal practitioner and client scale.

In the counter application, the respondents seek an order as follows: -

1. The counter application be and is hereby granted.
2. The respondent be and is hereby directed to submit to the applicant its company resolution authorizing the sale of property known as certain piece of land situate in the district of Goromonzi called Lot 2 of Lot 19B held under deed of transfer number 1188/11 and sign all necessary documents of processing the mortgage bond with Homelink (Pvt) ltd and transfer of the property into the applicants' names within 7 days of granting of this order to fulfil the agreement between the parties dated 3 October 2018.

3. In the event of the respondent's failure to carry out the obligation set out in paragraph 2 above, the Sheriff of the High Court or his lawful Deputy be and is hereby authorized to sign and execute all such documents on behalf of the respondent.

Alternatively

4. An order for tender of the sum of $130 000.00 RTGS for purchase of the property known as certain piece of land situate in the district of Goromonzi called Lot 2 of Lot 19B held under deed of transfer number 1188/11.
5. After payment of the purchase price in terms of paragraph 4 of the court order, the respondent be and is hereby ordered within 7 days to sign all the necessary documents and to take all necessary steps for transfer into the applicant's names of the following property: - certain piece of land situate in the district of Goromonzi called Lot 2 of Lot 19B held under deed of transfer number 1188/11.
6. In the event of failure by the respondent to carry out the obligation set out in paragraph 5 above, then the Sheriff of High Court or his lawful Deputy be and is hereby authorised to sign and execute all such documents on behalf of the respondent to enable transfer of the above property to applicants.
7. The respondent shall pay costs of suit on an attorney and client scale.

The applicant seeks vindication of the original title deeds of the Goromonzi property as described in the draft orders. These are currently in the possession of the respondents. On or around 3 October 2018, the applicant and the respondents entered into an agreement of sale. It was a term of the agreement that the purchase price was to be paid within 30 days from the date of signing of the agreement. To expedite implementation, the title deeds were handed over to the respondents' legal practitioner on the date of signing. The respondents failed to pay the purchase price within the agreed time frames or at all. The deed of transfer remains the property of the applicant and is being held by the respondents without consent. The applicant has not agreed to the continual holding of the deed. The respondents have refused to return it. Within 14 days after the signing of the agreement of sale on 3 October 2108, the respondents were supposed to furnish the applicant with a letter of guarantee and this was not complied with. The applicant's representative fell ill in January 2019, way after the time frames of 14 days and 30 days were over. Payment was not made within the expected time frames. The applicant was therefore entitled to cancel the

agreement in terms of the contract. The respondents seek to cast blame on the applicant but have not explained how the applicant made it impossible to get the letter of guarantee within 14 days as per the agreement. Without this letter that guarantees payment, the applicant could not be expected to transfer rights to the respondents. Applicant received $20 000 payment from the respondents but it was not part of the purchase price. This money was supposed to be repaid within 48 hours of receipt. The counter claim is based on specific performance but in *casu,* it is not possible to grant such remedy. That remedy would also occasion an injustice given that the purchase price was $150 000 Zimbabwean dollars. Given the currency fluctuation, the respondents would end up paying a paltry US$1851.85 for a ten-hectare property at the current exchange rate of 1:81 between the Zimbabwe and United States Dollars.

The respondents are opposed to the relief sought and make the following submissions. Whilst admitting that they concluded an agreement of sale with the applicant, the mortgage was not timeously concluded because the applicant's representative fell ill and was hospitalized. This made it difficult for him to furnish the legal practitioners with the company resolution and other documents required by Homelink. Some documents were supplied but not all. The other documents were supplied on the 25th of January 2019 but not the company resolution. This made it impossible to have the loan processed. The applicant subsequently cancelled the agreement and demanded the title deeds back. The applicant made it impossible to comply with the 30 days -time frame and therefore cannot seek to cancel the agreement and benefit from its own misdeeds. Whilst waiting for the mortgage bond to be finalised, the applicant received the sum of $20 000 towards the purchase price and there is no basis for the cancellation. The respondents did not breach the agreement as alleged.

The counter claim largely mirrors the respondents' notice of opposition. The applicant's notice of opposition also mirrors its application and answering affidavit.

The application and counter application being clearly linked.

In *casu,* the following is common cause: -

a. The parties entered into an agreement of sale for the Goromonzi property for the sum of $150 000 on 3 October 2018.
b. Clause 1 made the sale subject to a suspensive condition detailed in clause 4.1
c. Clause 4.1 stipulated that the purchase price was to be paid in accordance with the provisions of clause 2.

d. Clause 2.1 stipulated that the purchase price was to be paid within 30 days of the signing of the agreement through a mortgage provided by Homelink (Pvt) Ltd.
e. Clause 2.3 stipulated that the purchaser (in this case the respondents) shall furnish the conveyancers with a letter of guarantee from Homelink within 14 days of the signing of the agreement
f. Clause 9:1 stipulated that subject to the condition precedent (in clause 4) and notwithstanding any indulgences, if the purchaser failed to perform any obligations, and failure to remedy such breach within (30) days of notice, the seller shall be entitled to cancel the agreement or institute legal proceedings for the balance of the purchase price
g. Clause 9:2 stipulates that in the event of the seller being in default and being given 30 days' written notice to remedy the breach, the purchaser may by written notice cancel or enforce the agreement.
h. Clause 11 is on non-waiver of rights
i. Clause 15; 2 stipulates that no variation shall be valid unless it is reduced into writing.

It is common cause that the respondents did not furnish the applicants with the letter of guarantee within 14 days and they also did not pay the purchase price within 30 days as stipulated in the contract.

In my view the two legal issues that arise are the following: -

1. Has the applicant met the requirements of the granting of an order for *rei vindicatio?*
2. Are the applicants entitled to an order for specific performance?

The law relating to *rei vindicatio* has been set out in a plethora of cases in this and other jurisdictions- see *Jolly* v *A Shannon and anor,* 1988(1) ZLR 78 (HC); *Chetty* v *Naidoo,* 1971(3) SA 13(A); *Stanbic Finance Zimbabwe* v *Chivhunga* 1999 (1) ZLR 262; *Chitungwiza Municipality* v *Karenyi,* HH-93-18 and *Clover Leaf Motors Group (Pvt) Ltd* v *Zhou and Anor,* HH-241-18. Mr *Zimudzi,* whilst admitting that the title deeds are in the hands of the respondents stated that, they had a lawful right to them, having obtained them from the applicant in pursuance of an agreement of sale. Further that the agreement was unlawfully terminated and that is therefore the basis for the respondent's counter claim for specific performance. It is therefore prudent to analyse the latter issue because it has a bearing on the *rei vindicatio.* Mr *Zimudzi* submitted that the applicant delayed or withheld some crucial

documents and this affected the obtaining of the mortgage. The respondents thus pleaded the doctrine of fictional fulfilment stated by INNES J as follows: -

> 'I am therefore of opinion that in our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment, unless the nature of the contract or the circumstances show an absence of *dolus* on his part'- see *MacDuff & Co Ltd* v *Johannesburg Consolidated Investment Co Ltd,* 1924 AD 573 at 591.

In support of this contention, the respondents attached various correspondence in the form of letters and emails. The respondents also contended that the applicant's representative fell ill at the time that he was supposed to have furnished the requested documents.

In my view, the doctrine of fictional fulfilment can only operate during the life span of the agreement. It was signed on 3 October 2018 meaning that the letter of guarantee was supposed to be furnished within 14 working days. This period expired on 23 October 2018 given the reference to working days. The 30-day period given its calendar meaning expired on 2 November 2018. All the documents placed on record by the respondents are outside those dates. There is nothing in the agreement of sale that speaks to the various requirements touted by the respondents, i.e the board resolution and company related documents. The respondents also seem as stated in their heads of argument to rely on the doctrine of trade usage. In paragraph 31 of their heads they state that, *'It is common cause that the purchase price is to be facilitated by Homelink (Pvt) Ltd through a mortgage bond. That is what the parties agreed to. Furthermore, it is common cause that in mortgage transactions, a letter of guarantee can only be issued after the submission of all documents for processing of the mortgage and after approval of the facility. On agreeing to the sale being funded by a mortgage this is what the parties agreed to.'*

The approach to be adopted in trade usage is as aptly stated by CORBETT J in *Golden Cape Fruits (Pty) Ltd* v *Fotoplate (Pty),* 1973 (2) SA 642 (C) at 645: -

> 'Nevertheless, despite its ignorance, appellant would be bound by-and the contract would be subject to – the alleged trade usage provided that it is shown to be universally and uniformly observed within the particular trade concerned, long-established, notorious, reasonable and certain, and does not conflict with positive law, (in the sense of endeavouring to alter a rule of law which the parties could not alter by their agreement) or with the clear provisions of the contract.'

In my view, the court in the absence of clear evidence put before it on trade usage cannot make suppositions. It was up to the respondents to place clear evidence before the court on trade usage relating to mortgages that would support their contention.

The respondents further contended that requisite notice in terms of s 9(1) of the agreement had not been given. Mr *Matsanura* submitted that s 9(1) is clear that it is subject to the condition precedent. This condition is found in clause 4.1 and relates to the payment of the purchase price as per clause 2.1 within 30 days. He further submitted that in terms of s 9(2) of the agreement, if the seller (in this case the applicant) was in default and failing to remedy it within 30 days of written notice, the purchaser may by way of written notice either cancel the agreement or enforce it and in either case claim damages. No such written notice was given. As remarked by INNES CJ in *Laws* v *Rutherfurd*, 1924 AD 173 at 175,

> 'principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand; *dies interpellat pro homine,* and the debtor is in *mora,* if he fails to pay on the appointed date'

The agreement is clear that payment ought to have been made within a period of 30 days. The date was set and there was no need in my view for the applicants to give notice.

The respondents further contended that the applicant received $20 000 towards the payment of the purchase price. The agreement relating to this payment is very clear that should the agreement of sale relating to the immovable property fall through, it shall be converted into a loan to be repaid within a certain time frame. In the event of breach, legal action was provided for with parties consenting to the jurisdiction of the Magistrates Court, Harare. It is therefore not correct that the money was paid as part of the purchase price.

It is trite that an order for specific performance is at the discretion of the court – see *Zimbabwe Express Services (Pvt) Ltd* v *Nuanesti Ranch (Pvt) Ltd*, SC 21/09. GARWE JA (as he then was) stated as follows: -

> "Were specific performance to be granted, the effect would be that the appellant would take delivery of 280 heifers and steers for a very small amount of money. In other words, the appellant would be entitled to take possession of a herd of cattle worth a considerable sum of money for which it would have paid virtually nothing. In these circumstances, specific performance cannot be granted".

In *casu,* the agreement of sale was entered into in October 2018. Since that date a lot has happened in relation to the currency and inflation in Zimbabwe. HEFER JA in *Benson* v *South Africa Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 783 C-D (cited with approval in *Zimbabwe Express Services (Pvt) Ltd* v *Nuanesti Ranch (Pvt) Ltd (supra),* stated *on* discretion that it is: -

> "[not] … completely unfettered. It remains, after all, a judicial discretion and from its very nature arises from the requirement that it is not to be exercised capriciously, nor upon a wrong principle (*Ex parte Neethling* (*supra* at 335). It is aimed at preventing an injustice – for cases

> do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant."

As aptly submitted by Mr *Matsanura*, the property will go for practically nothing if an order for specific performance were to be granted.

Both the defence to the application for *rei vindicatio and* the counter application by the respondents therefore have no merit and ought to be dismissed.

It follows therefore that the applicant has met the requirements for an application for *rei vindicatio.*

Costs should follow the cause and accordingly, the applicant is entitled to its costs.

DISPOSITION

It is ordered as follows:

Main application

1. The 1st and 2nd respondents be and are hereby ordered to surrender the original title deed to a certain piece of land situate in the district of Goromonzi called Lot 2 of Lot 19B James Farm measuring 9,9976 hectares being Deed of Transfer number 1188/11.
2. The deed of transfer described in paragraph one above shall be delivered to Messrs Mboko T.G legal practitioners or their successors in title within a period of seven days of the date of service of this order on Messrs Zimudzi and Associates or their successors in title.
3. That the 1st and 2nd respondents be and are hereby ordered to pay costs of suit

Counter application

1. The counter application is dismissed with costs.

Mboko T.G, applicant's legal practitioners
Zimudzi & Associates, respondents' legal practitioners