

NEVER BVOCHORA

versus

DOUGLAS TOGARASEI MWONZORA (In his  
capacity as The executor Dative of the Estate Late I V Rukatya)

HIGH COURT OF ZIMBABWE

HUNGWE J

HARARE, 15 & 24 June 2009

HUNGWE J: The plaintiff issued summons against the Executor Dative in the Estate of the late I.V. Rukatya of Chiredzi claiming an order that the cancellation of the Agreement of Sale by the defendant be set aside; that the plaintiff pays to the defendant the sum of Z\$400 million (old value) within seven days; that the defendant takes all the necessary steps to pass transfer of plot No. 339 Mkwesine Settlement Holdings, Ndanga District to the plaintiff within 21 days of this order failing which the Deputy Sheriff be authorised to sign all papers necessary to pass such transfer to the plaintiff.

He also seeks costs against the defendant.

The parties on 18 November 2008 appeared before UCHENA J in a pre-trial conference. They were represented by counsel. The matter was referred to trial on four broad issues namely

- (a) whether the plaintiff breached the initial agreement of sale;
- (b) whether the initial agreement of sale was cancelled by the defendant;
- (c) Whether the defendant offered the plaintiff a subsequent agreement of compromise in which he restructured the payment of the balance of the purchase price and if so the effect thereof.
- (d) Whether the plaintiff is entitled to specific performance.

At the trial the plaintiff was no longer represented. Defendant was acting for himself. He is a legal practitioner.

Plaintiff gave evidence himself. He did not call any witness. His evidence was that he had entered into an agreement of sale of plot 339 Mkwesine with the defendant. In terms of that agreement, which is now exh 1 he was to pay Z\$300 million by 20 February 2006, Z\$50 million by 4 April 2006, Z\$200 million by 28 April 2006 and the balance of Z\$200 million by 31 May 2006. He claimed that he paid the deposit in terms of the agreement. After he paid Z\$50 million, the plaintiff says that the defendant advised that the beneficiary did not wish to be paid in cash but in the form of sugar. It was agreed that the defendant's Masvingo office was to draw up a new Agreement of Sale which would set out the new

terms. Defendant actually telephoned one Shumba, when they met in Chiredzi and the defendant gave this instruction to Shumba in his hearing over the phone.

When the subsequent agreement was drawn up he had signed it and returned all the copies to Shumba so that these are signed on behalf of the defendant. He never saw these copies thereafter.

When he persisted with his demand for specific performance none was forthcoming. He later learnt that the defendant had declined to sign the subsequent agreement as the beneficiary was no longer interested in the whole deal. He then sued.

Defendant in his evidence states that the parties entered into one agreement exh 1. Plaintiff paid Z\$350 million in 2006. He failed to pay the balance and the defendant cancelled the agreement. He disputed that a subsequent compromise agreement was entered into between the parties. If this was so, then such agreement was not authorized by him hence it did not bind him. He insisted that he would not have consented to payment in kind since at the time the minor beneficiaries needed cash to pay school fees.

The defendant therefore disputes that the plaintiff is entitled to specific performance as he is in default of the agreement.

It seems to me that the parties intended to be bound by an agreement to sell. They concluded exh 1 for some reason that was a discussion as to the need to change the method of payment. If the defendant was not involved in this discussion it is clear someone on his behalf was involved. Defendant in my view is estopped from denying the subsequent discussions since an agent of his had previously acted on his behalf and signed exh 1. It is a trite that an agent can bind his principal if he is acting within his mandate. Defendant admitted that exh 1 was signed by someone from his office. So to all intents and purposes he gave out to the plaintiff that such a person was mandated to act for and on his behalf.

But the subsequent agreement was not signed by anyone on behalf of the defendant. It cannot therefore be said to exist. That leaves the parties with exh 1. But exh 1 had been mutually abandoned by the parties. Consequently there was no agreement between the parties.

This is so because by the plaintiff's evidence, a subsequent agreement was indeed drawn by the defendant's office. It was never signed by the defendant or by someone authorised to do so. In the end there was no agreement between the parties. Plaintiff cannot succeed in the present papers. He could lead other evidence upon which he may eventually succeed.

In the result I grant absolution from the instance.

*Costa & Madzonga*, plaintiff's legal practitioners

*Mwonzora & Associates*, defendant's legal practitioners