JAMES CAMPION MUTETWA
versus
BARRIE JAMES CLARKE DIXON
and
MARKO MAVHURUNE N.O.
(In his capacity as the Executor Dative in
the Estate of the Late Samuel Mushaninga)
and
KENIAS MUTYASIRA N.O.
(In his capacity as the Executor Dative in the Estate
of the Late Salome Kudzayi Chisvo)
and
THE REGISTRAR OF DEEDS.

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 11 March and 14 April 2010.

OPPOSED APPLICATION
Mr T Tandi for applicant;
Mr J Shekede for respondents.

MAKARAU JP: In or about January 2006, the applicant and the first respondent entered into an agreement of sale in respect of certain immovable property called Stand number 584 Greystone Park Township of Greystone. In terms of the written agreement, the purchase price for the property was the sum of $400 000 000-00 and this was to be paid in full within 5 days of the signing of the agreement. The payments clause in the agreement of sale provided that the purchase price was payable in full upon the signing of the agreement but a special condition of the agreement provided that the payment be made within five working days of the signing of the agreement failing which the agreement would be considered null and void.

It is common cause that the applicant did not pay the full purchase price within the stipulated period or at any time thereafter. The parties appear to have agreed immediately after executing the agreement that the purchase price of the property be converted to the sum of US120 000-00 and that payment be made into a Channel Islands bank account whose details were furnished to the applicant by the first respondent. This variation to the written agreement was not itself reduced to writing

In pursuance of the new agreement, the applicant paid the sum of US$30 000-00 to the applicant by making a deposit into the nominated account. He also paid the estates agents'

commission in local currency in the sum of $30 000 000-00 directly to the estate agents who had arranged the sale.

In due course, the first respondent pressed for payment of the balance of the purchase price in foreign currency as the applicant was taking too long to remit same. The applicant tendered local currency which was spurned by the first respondent. On 22 February 2007, the estate agency acting on behalf of the first respondent wrote to the applicant canceling the agreement of sale. In the letter, the agency alleged that the applicant was in breach of the written agreement of sale in that he had failed to pay the full purchase price within five working days of the execution of the agreement of sale. The applicant denied that he was in breach of the agreement but did not thereafter take any steps to enforce the agreement of sale against the first respondent. In due course, the property was sold jointly to the Late Samuel Mushaninga and the Late Salome Kudzai Chisvo. Before transfer could be effected in favour of the second purchasers, the applicant obtained an order restraining the first respondent from doing so. In the meantime, the second purchasers took occupation of the property.

On 10 July 2009, the applicant filed this application, seeking an order compelling the first respondent to pass transfer of the property to him against payment of the sum of Z$370 000 000-00 and also evicting the first respondent and all those occupying through him from the property. It may be pertinent at this stage to note that the applicant brought a similar application in 2007, which he withdrew in June 2009, with a tender of costs.

The first respondent was served with the application through service upon one Violet Tanda at the disputed property. It is not indicated on the certificate of service who Tanda is and in what capacity she accepted service of the court application on behalf of the first respondent as it is common cause that first respondent left the country immediately after selling the property to the applicant and that the families of the late Mushaninga and the late Chisvo are the ones in occupation of the property.

Not surprisingly, the first respondent did not oppose the application.

I have considered but have not decided on the issue whether the purported service on the first respondent in this matter is proper. In view of the conclusion that I reach in this matter, it is not necessary that I determine the issue. I simply raise it to highlight that in another forum the issue will have to be determined before an order can be made against the first respondent.

The second and third respondents did oppose the application. Of material importance in the opposing affidavits filed by the second and third respondents is a narration of how the Late Mushaninga and the Late Chisvo purchased the property from the first respondent and paid the full purchase price. The respondents also sought to argue that the applicant was in breach of the contract between himself and the first respondent, prompting the applicant to challenge their locus *standi* to make such allegations.

The situation presented by the facts of this mater depicts to me the classical double sale situation. The first respondent first sold the property in dispute to the applicant and thereafter to the late Mushaninga and the Late Chisvo who purchased the property jointly. The first purchaser now approaches court for an order of specific performance ahead of the second purchasers.

As stated above, at the hearing of the matter, the applicant took the point in *limine* that the second and third respondents had no *locus standi* in the matter to challenge the validity of the contract between the applicant and the first respondent. In this regard, the use of the term "*locus standi*" was in my view misplaced. Locus relates to the standing of the party before the court. It does not relate to the weight that should attach to the evidence of a party that was not close to the transaction and who has no personal knowledge of such. The issue of *locus standi* does not arise in this matter as the second and third respondents have each an interest to protect in the property in dispute. In any event, the applicant cited the second and third respondents in this application and it cannot lie in his mouth to deny them *locus standi* after he has dragged them to court.

It appears to me that what the applicant intended to do was to urge the court not to attach any weight to the averments of the respondents regarding the alleged breach of the sale agreement by the applicant as they were not close to the transaction. As will emerge from this judgment, the breach of the agreement by the applicant is in my view self confessed.

The law relating to double sales is well settled.

The principles which apply where a person sells a property to two or more persons separately were set out by this court in *Crundall Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125 (S) at 132G-133C. relying on the Article by Professor E.M Burchell titled "Successive Sales" and published in the South African Law Journal in 1974, this court adopted the approach set out by the late Professor McKerron in his article, "Purchaser with

Notice", published in 1935 in the South African Law Times. The conclusions reached at by Professor Mackeron appeared in his article as follows:

"It is submitted that where A sells a piece of land to B and then to C….the rights of the parties are as follows:

(1) Where transfer has been passed to B, B acquires an indefeasible right, and C's only remedy is an action for damages against A.

(2) Where transfer has been passed to C, C acquires an indefeasible right if he had no knowledge, either at the time of the sale or at the time he took transfer, of the prior sale to B, and B's only remedy is an action for damages against A. if however C had knowledge at either of those dates, B , in the absence of special circumstances affecting the balance of equities, can recover the land from him, and in that event, C's only remedy is an action for damages against A.

(3) Where transfer has been passed to neither, B, in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance on the contract, and in that event, C's only remedy is an action for damages against A."

The facts of the matter before me fall into the third conclusion reached by the Late Professor R G McKerron. Transfer has passed to neither. The issue that immediately falls to be determined is whether the applicant is entitled to specific performance on the written contract of sale as he prays for. If he is so entitled, his right to the property should prevail unless there are special circumstances in the matter that favour the second purchasers.

Specific performance is a discretionary remedy. Generally speaking, any party to a binding contract, who is ready to carry out his own obligations, has a right to demand from the other party, so far as this is possible, reciprocity. (See *Farmer's Coop Society (Reg) v Berry* 1912 AD 343 and *Haynes v Kingswilliamtown Municipality* 1951 (2) SA 371 (A) at 378- 379 C).).

It is trite that before a party can approach the court for specific performance, he or she must set up a contract, whose terms are clear and unequivocal and in terms of which the order is to be granted. Trite as it may be, the issue arises before me as to what contract the applicant is setting up before me and upon whose terms I must grant specific performance as the applicant has deposed to two possible agreements between the parties. I find however that each is fraught with fatal difficulties.

It is convenient that I dispose of the second agreement first. As stated above, after the parties had concluded the written agreement of sale, they verbally agreed that the purchase price be converted to the sum of US$ 120 000-00 and that payments be made into an offshore account whose details the first respondent furnished to the applicant. The applicant part performed under this verbal agreement and when he was failed to pay the balance of the US$120 000-00, the first respondent purportedly cancelled the agreement of sale.

I cannot grant specific performance of the second agreement of sale for two good reasons. Firstly, and this should effectively close the matter, the applicant has not sought specific performance of this arrangement. He urges me to ignore it and for me to revert to the written agreement between the parties. Secondly, even if I could find that this was the effective agreement between the parties, as I am inclined to, I would not have been able to grant specific performance on it as it was tainted with illegality. The parties, whilst resident in this country and without the prior approval of the foreign exchange authorities, had sought to trade in foreign currency for a property in Zimbabwe.

It appears to me that being aware of the illegality tainting the second arrangement and most probably , also wishing to avoid the onerous obligations imposed upon him by the arrangement, the applicant has urged me to enforce the written agreement between the parties wherein the purchase price was payable in local currency. The applicant has not given me a reason why I should revert to the written agreement in view of the subsequent developments between the parties.

It is common cause that almost immediately after concluding the written agreement of sale, the parties entered into the verbal arrangement, the details of which I have already given. It is further common cause that the applicant did not pay the local purchase price of the property in local currency within the stipulated five days or at all.

In my view, the fact that the second arrangement was entered into almost at the same time as the written agreement and was acted upon whilst the terms of the written agreement were not, strongly suggests that the parties did not intend to be bound by the written agreement at all. It was a sham. It was not contracted with the necessary *animus*. It was never meant to be binding between the parties but to clothe the transaction between the parties with some legality in the event that the transaction attracted the scrutiny of the authorities. I am fortified in reaching this conclusion from the actions of the parties. The first respondent never demanded

payment of the purchase price in local currency. The applicant himself did not approach the court to enforce the contract by tendering the purchase price in local currency. It was as if the written contract was never written until the applicant failed to raise the balance of the foreign currency. Then, for convenience, the first respondent alleged breach of the written agreement.

Assuming that I have erred in holding that the written agreement was concluded without the necessary animus and is thus not binding between the parties, I still would have refused the applicant an order of specific performance on the same. By his own confession, the applicant is n breach of the agreement. It was a specific term of the agreement that the purchase price in full be paid within five working days of the agreement. Failure to pay within the stipulated period would render the agreement of no force and effect. Thus, the failure by the applicant to make the stipulated payment on due date made the agreement lapse ipso facto. At the time he brought his application to court, the contract had long lapsed and could not be revived for enforcement.

Finally and in any event, assuming that the contract had not automatically lapsed when the applicant failed to make the stipulated payment on due date, I would have withheld my discretion to grant specific performance in the circumstances of this matter. In *Zimbabwe Express Services (Private) Limited v Nuanetsi Ranch (Private) Limited* SC21/09, the Supreme Court declined to order specific performance of a contract whose contract price had been determined in 2003 and had been eroded into nothing by inflation at the time specific performance was sought. In declining to order specific performance, the court was of the view that were it to grant specific performance, the appellant it that matter would take delivery of 280 heifers for a very small amount of money. In other words, the court reasoned, the appellant would take possession of a herd of cattle worth a considerable sum of money for which it would have paid virtually nothing.

In the matter before me, it is common cause that the applicant is seeking an order compelling the first respondent to transfer the immovable property to him against payment of the sum of Z$370 million. It is not in dispute that the local currency has now gone into disuse and is accordingly valueless currently. The order that the applicant seeks is for him to obtain transfer of a patently valuable asset against the payment of a valueless currency. While this court upholds the principle of the sanctity of contracts, it will also not grant specific performance of a contract where to do so will result in an apparent injustice.

I do not see any features in the application before me that would distinguish the case from the case that was before the Supreme Court.

It is therefore my finding that even without the advent of the second purchasers, the applicant would not have succeeded in enforcing any of the two agreements of sale that he concluded with the first respondent in respect of the property in dispute.

In view of the conclusions I reach in this matter, it appears unnecessary to me that I embark on an exercise of determining whether there are any special circumstances in this matter that disentitle the applicant from obtaining an order transferring the property to him ahead of the second and third respondents. It is my finding that the applicant has not been able to establish that he is entitled to specific performance of the contract that he seeks to rely on.

In the result, I make the following order:

1. The application is dismissed.
2. The applicant is to bear the respondents' costs.

Kantor & Immeramn, applicant's legal practitioners.
Wintertons, 2nd and 3rd respondent's legal practitioners.