

PONDAI MUSHAMBADOPE  
versus  
CHAMPION CONSTRUCTORS (PVT) LTD  
and  
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE  
ZHOU J  
HARARE, 3 July 2013

*A. Chagonda* for the applicant  
*C. Nhemwa* for the first respondent

### **Opposed Application**

ZHOU J: This is an application in which the applicant seeks an order of specific performance of a contract of sale. The relief sought is set out in the draft order as follows:

“IT IS ORDERED THAT:

1. The first respondent be and is hereby directed to sign all documents necessary for the transfer of Stand 1195 of Hilton of Subdivision A of Waterfalls measuring 2040 square metres in favour of the applicant within 48 hours of service of this order upon them (*sic*), failing which the Deputy Sheriff, Harare be and is hereby authorised to execute such documents on first respondent’s behalf.
2. The second respondent be and is hereby directed to approve such transfer.
3. The first respondent pays the costs of suit on a legal practitioner and client scale.”

The facts which underlie the case are as follows: On or about 15 June 2011 the applicant and first respondent entered into an agreement, which was reduced to writing. In terms of that agreement the latter sold to the former an immovable property. The property is described in the agreement as a “certain piece of land situate in the District of Salisbury called Stand 1195 of Hilton of Subdivision A of Waterfalls, measuring 2040 square metres”. It was a vacant piece of land. The purchase price in the sum of US\$20 500.00 was to be paid by way of a deposit of US\$20 000.00 which was to be paid to Rainer Robinson Trust Account upon signing of the agreement, and the balance of US\$500 was to be paid within thirty days from the date of signing of the agreement. Rainer Robinson legal practitioners

were the conveyancers appointed by the parties in the agreement of sale. It is common cause that a sum of US\$20 000.00 was paid into the account of Rainer Robinson on 16 June 2011. The balance of the purchase price in the sum of US\$500.00 was paid into the same account on 21 June 2011.

Thereafter the first respondent did not sign the necessary documents to effect transfer of title in the property to the applicant.

The first respondent opposes the application on the ground that it cancelled the agreement of sale because Robinson and Makonyere, the successors to Rainer Robinson legal practitioners, did not transmit to it all the money which they received from the applicant. In the opposing affidavit deposed to by its director, Elizabeth Chidavaenzi, the first respondent contends that it has not received the full purchase price for the property. First respondent does not state how much it received from Robinson and Makonyere legal practitioners. It states that no statement of account was received from Robinson & Makonyere legal practitioners on the purchase price paid by the applicant.

An affidavit deposed to by Shepherd Makonyere a senior partner in the law firm states that he received instructions from the first respondent in respect of the US\$20 000. He was instructed to pay US\$1 000 to the estate agent for commission, US\$5 800 to a Mr Mafuso and US\$1 500 to a Mrs Ruzive. A sum of US\$250 was kept to cater for the rates while an amount of US\$2 050 was retained as provision for endowment. A sum of US\$8 375 was paid directly to the first respondent and was received on its behalf by one H. Chigaadziwa, an employee of the first respondent. A sum of US\$3 825 is being held in a trust account pending transfer of the property to the applicant. The transactions were in accordance with instructions given by the first respondent, according to Makonyere. The averments in Makonyere's affidavit have not been disputed by the first respondent and, in accordance with the law, must be accepted. That principle is succinctly articulated in the case of *Fawcett Security Orps (Pvt) Ltd v Director of Customs & Excise & Ors* 1993 (2) ZLR 121(S) at 127F, as follows:

“The simple rule of law is that what is not denied in affidavits must be taken to be admitted.”

See also *Shumba & Anor v ZEC & Anor* 2008 (2) ZLR 65(S) at 70G-H; *Minister of Lands & Ors v Commercial Farmers' Union* 2001 (2) ZLR 457(S) at 494C-D; *Nhidza v Unifreight* S-27-99.

Mr *Nhemwa* for the first respondent contended that the issue for determination is whether Rainer Robinson was agent of the applicant or of the first respondent. I do not agree that that is a correct identification of the issue. The simple issue is whether the applicant made payment of the purchase price in accordance with the contract. The written contract prescribed for the applicant how payment was to be made. The applicant made the payment to Rainer Robinson as stipulated in clause 4 of the agreement signed by the parties. The agreement contains what is commonly referred to as a “whole agreement” clause. Clause 15 provides as follows:

“This agreement constitutes the entire contract between the parties hereto otherwise than as may be recorded herein and:-

No warranty, representation, promise or undertaking has been given or made by either party to the other except as recorded in this agreement. There are no conditions precedent suspending the operation of this agreement, is (*sic*) not referred to herein. No variation in this agreement shall be valid unless reduced to writing and signed by or on behalf of the parties hereto.”

The agreement does not state that Rainer Robinson were the applicant’s agents. In any event, the first respondent in para 6 of the opposing affidavit admits that Robinson and Makonyere received the money paid by the applicant on its behalf. Also, the affidavit of Shepherd Makonyere shows that Robinson & Makonyere legal practitioners did receive instructions from the first respondent as to how the purchase price was to be appropriated.

Mr *Nhemwa* sought to challenge from the bar the payments made by Robinson and Makonyere to third parties referred to above. His submission was to the effect that the entire US\$20 500 was to be released to the first respondent without deduction. The submission is inconsistent with the letters written on behalf of the first respondent by Miss E. Chidavaenzi which are attached to the affidavit of Shepherd Makonyere. In a letter dated 24 June 2011 addressed to RM-Africa, the estate agents who brokered the agreement of sale, the first respondent refers to a sum of “over US\$3 000” which had not been released to it. Then in a letter dated 4 November 2011 written to Robinson and Makonyere Elizabeth Chidavaenzi complained that a sum of US\$3 500 was being held by that law firm from the proceeds of the sale. The first respondent was given an account of how the money had been allocated in a letter dated 17 June 2011 written by Robinson and Makonyere legal practitioners. That letter was received and signed for by one H. Chagaazira on 17 June 2011. The account was not

challenged. It was, in fact, accepted by the first respondent as clearly illustrated by the two letters referred to above. The statement in the opposing affidavit that no statement was received from Robinson & Makonyere is therefore clearly false.

The submission that the agreement of sale was cancelled cannot be sustained. There were no grounds upon which it could be cancelled. Even if such grounds existed, the agreement provides a procedure for cancelling. Clause 12.1 provides that the seller can only cancel the agreement after giving the purchaser fourteen days' written notice to remedy a breach. No evidence of either the notice or the cancellation was placed before the Court.

Given the above, I come to the conclusion that the applicant discharged his obligation in terms of the contract when he paid the full purchase price to Rainer Robinson legal practitioners. See *Ncube v Mpofo & Ors* 2006 (2) ZLR 41(H) at 44C. In the case of *Farmers Co-operative Society v Berry* 1912 AD 343 the position of the law that every party to a binding contract who is prepared to perform his part of the agreement is entitled to demand specific performance from the other party to the agreement is settled. I am persuaded that the applicant is entitled to that relief.

The applicant has asked for costs to be awarded against the first respondent on an attorney-client scale. Reliance was placed on the case of *Nel v Waterberg Land Bouwers Co-op* 1946 AD 597. At p. 607 of that judgment the Court stated the following;

“The true explanation of awards of attorney and client costs not expressly authorised by statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action as from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused him by the litigation.”

See also *Mudzimu v Municipality of Chinhoyi* 1986 (1) ZLR 12(H).

In the instant case, I am persuaded that a special order of costs is justified by the vexatiousness of the defence tendered by the first respondent to the claim. The first respondent was aware that the agreement provided that the applicant must pay the purchase price into the account of Rainer Robinson. The applicant discharged that obligation. There is no obligation placed on the applicant to ensure that the money should be released to the first respondent. That is a matter between the first respondent and Robinson and Makonyere. The first respondent knows too that it has not cancelled the agreement of sale, and that Robinson and Makonyere hold part of the money they received on its behalf in a trust account. If the

first respondent had signed the documents to pass transfer when it was called upon to do so it would have received that money by now. Instead, it chose to vigorously oppose the application. Thus the applicant has been put to unnecessary expense in seeking to enforce the agreement. He must recover his costs in full.

In the result, it is ordered as follows:

1. The first respondent, through its representatives, is hereby ordered to sign all documents necessary to register transfer of Stand 1195 of Hilton of Subdivision A of Waterfalls in favour of the applicant within forty-eight hours of this order being granted failing which the Sheriff or his assistant be and is hereby directed to sign all such documents necessary to register the property in the name of the applicant.
2. The costs of suit shall be paid by the first respondent on an attorney-client scale.

*Sawyer and Mkushi*, applicant's legal practitioners

*C.Nhemwa & Associates*, first respondent's legal practitioners