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REPORTABLE ZLR ONLY (1)

Judgment No. S.C. 1/99
Civil Appeal No. 501/97

(1) BETTY FELICITY BARROS

(2) PROMPT BUILDERS COMPANY (PRIVATE) LIMITED vs

GIDEON JUSTAS CHIMPHONDA

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, EBRAHIM JA & MUCHECHETERE JA
HARARE, JANUARY 14 & 25, 1999

P Nherere, for the appellants

H Simpson, for the respondent

GUBBAY CJ: This appeal is against the judgment in *Chimphonda v Rodriques and Ors* 1997 (2) ZLR 63 (H). It granted with costs an order directing the second appellant, Prompt Builders Company (Private) Limited, then the third defendant, to cause transfer of Lot 2 of Stand 98 of Prospect ("the property") to be registered in the name of the respondent, then the plaintiff.

Litigation arose as a result of the first defendant, Junia Patricia Rodriques, transacting a double sale of the property, first to the respondent and then to the second defendant, as represented by its managing director, Betty Felicity Barros, now the first appellant. Both purchasers were victims of a fraud perpetrated by Mrs Rodriques. Each paid her in full for the property. Which of them deserved to win?

Thus, in this Court, the issues debated were confined to:

(a) whether the facts and circumstances preceding the transfer of the property to the second appellant were such as to preclude the respondent from seeking the positive enforcement of his pre-emptive right to the property; and

(b) whether, in the event of it being considered that the second appellant had notice or knowledge of the respondent's rights prior to the passing of ownership, the balance of equities were such that its title to the property should not have been disturbed.

The background to this unfortunate dispute, involving as it did two innocent persons, was substantially uncontroversial. It may be set out as follows:

(1) On 17 March 1994 the respondent entered into a written agreement of sale with Mrs Rodriques, in terms whereof he purchased the property for the sum of $150 000, payable as to deposit of $30 000, as to the sum of $30 000 on or before 30 April 1994 and as to the balance by monthly instalments of $7 000, with interest at the rate of 22 per centum from 1 May 1994. Reference to this instalment sale agreement was not endorsed on the title deed of the property pursuant to s 64 of the Deeds Registries Act [*Chapter 20:05*].

(2) At all material times the respondent resided in Malawi where he operated a public transport business. His agent in this country was Mrs Gladys Masunda. By the end of May 1995 Mrs Rodriques had

received an amount of $190 000 in respect of the purchase price of the property. She had been overpaid by the respondent.

(3) On 29 November 1995 Mrs Rodriques sold the property to the second appellant for $135 000, payable as to a deposit of $13 000, with the balance due against registration of title.

(4) At the date of the second sale the first appellant was unaware of the existence of the prior sale to the respondent.

(5) Shortly thereafter the first appellant learned of the sale of the property to the respondent. She was assured, however, by Mrs Rodriques, in the presence of the latter's legal practitioner, Mr P C Paul, that such sale had been cancelled. Both the first appellant and Mr Paul were totally convinced that Mrs Rodriques had spoken the truth.

(6) During February 1996 the second appellant commenced to effect certain improvements to the property. An amount of $30 000 was expended thereon.

(7) On 30 April 1996 the second appellant paid Mr Paul the balance of the purchase price of the property together with all conveyancing charges.

(8) On the evening of 1 June 1996 Mrs Masunda telephoned the first appellant. She had heard that the first appellant had paid $20 000 to Mrs Rodriques in respect of the property. She advised the first appellant that the property had been sold to, and paid for in full by, the respondent, and that Mrs Rodriques was a crook. The first appellant

told Mrs Masunda that any problem the respondent had about the sale of the property should be taken up with Mrs Rodriques. She emphasised that she was going ahead with the sale, that everything had been done legally, and that she had all the papers relating to the property. The first appellant did not think fit to inform Mrs Masunda that the purchase price as well as the transfer fees had been paid, and that registration of the property to the second appellant was expected soon.

(9) On 6 June 1996 Mr Paul lodged with the Registrar of Deeds all the documents required to effect transfer; and on 13 June 1996 title to the property was duly registered in the name of the second appellant.

(10) On no occasion between 1 and 13 June 1996 did the first appellant contact Mr Paul, or attempt to do so, in order to inform him of the telephone conversation she had held with Mrs Masunda. Nor did the first appellant query with Mrs Rodriques whether it was true that the sale of the property to the respondent had not been cancelled. She simply kept her silence.

(11) After speaking to the first appellant, Mrs Masunda, in the company of the appellant's brother, approached Mrs Rodriques. She denied having sold the property to anyone other than the respondent.

(12) On 25 June 1996 Mr Paul paid to Mrs Rodriques the net proceeds of the property sold to the second appellant, namely, $83 000.

(13) Three days later the respondent instituted proceedings against Mrs Rodriques and the two appellants by way of a chamber application. After opposing affidavits had been filed, the matter was referred to trial for determination, with the appellants being ordered in the interim not to sell or otherwise alienate the property.

Years ago the court's approach to the situation of a double sale of immovable property was to hold that because neither the first nor the second purchaser had a better right than the other, specific performance would not be granted to either, or would be granted only with an alternative of damages. See *Kohling v McKenzie* (1902) 19 SC 287 at 288; *Ex parte Kruger* 1936 (2) P.H. A56 (C) at 143. Soon it was appreciated that this solution was unsatisfactory because it left the choice to the seller who had caused the problem, more often than not by bad faith; and additionally, it paid insufficient regard to the principle enshrined in the maxim "*qui prior est tempore potior est jure*". See *Pienaar and Anor v van Lill* 1928 CPD 299 at 301 *in fine* - 302; *van der Merwe v Scheepers and Ors* 1946 TPD 147 at 154; *Campbell v First Consolidated Holdings (Pty) Ltd* 1977 (3) SA 924 (W) at 928G-929B. Another principle, apparently conflicting, was applied in *Hofgaard v Registrar of Mining Rights* 1908 TS 650 at 654 and *Miller v Spamer* 1948 (3) SA 772 (C) at 779, namely, that specific performance should be granted to the purchaser who can show a balance of equities in his favour. But in *Le Roux v Odendaal and Ors* 1954 (4) SA 432 (N) at 443 B-F a compelling persuasive combination of these principles was suggested by BROOME JP. It is that approach which has been applied by the courts of this country. See *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd* 1964 RLR 7 (GD) at 11 H-J; *Lindsay v Matthews and Anor* 1972

(1) RLR 186 (GD) at 193A; *Crundall Brothers (Pty) Ltd v Lazarus N O and Anor* 1991 (2) ZLR 125 (S) at 133 A-B.

Mr *Nherere*, who appeared for the appellants, had no option but to accept that prior to transfer, the second appellant had notice or knowledge, through the first appellant, of the prior existing sale of the property to the respondent. This fact notwithstanding, counsel argued that the second appellant had acquired an indefeasible right to the property, because by 1 June 1996 the first appellant had done all that was required of her for transfer to be passed into the name of the second appellant. Accordingly, so the argument proceeded, to apply the doctrine of notice to the present case would be to oblige the first appellant, who initially had acted in ignorance of the respondent's rights, to have taken steps, after 1 June 1996, to reverse what had been done in good faith. In short, it was urged that the doctrine of notice does not go as far as to impose a duty upon a second purchaser to undo what was done in good faith.

Innovating as this contention is, I do not believe that the gloss it seeks to impart to the doctrine of notice or knowledge is maintainable. The crux of the matter is that the second appellant, through the first appellant, became aware of the respondent's rights before the passing to it of ownership in the property. The first appellant deliberately held her tongue. She omitted to tell Mrs Masunda that transfer of the property to the second appellant was imminent. She did not do so for fear that some action might be taken which would delay or upset the passing of ownership to the second appellant. She did not disclose to Mr Paul that, contrary to what Mrs Rodriques had told them, according to Mrs Masunda the sale of the property to the

respondent had not been cancelled. If Mr Paul had been so appraised, it is more than probable that he would have withheld lodging the deed of transfer for registration and have made his own enquiries. I would stress therefore that as at 1 June 1996 the position had not been reached at which transfer of ownership of the property to the second appellant was inevitable and beyond the control of the first appellant to prevent.

Consequently, I am satisfied that ROBINSON J, who presided at the trial, correctly applied the principle that as the second appellant had knowledge at the time that it took transfer of the prior sale, the respondent had a right to specific performance (which was the remedy claimed) unless there were special circumstances affecting the balance of equities.

The determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first - one which clearly involved the exercise of a judicial discretion, see *Farmers' Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350 - may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it

has the materials for so doing. In short, this Court is not imbued with the same broad discretion as was enjoyed by the trial court.

One further point needs to be underscored. It is that the second appellant bore the burden of establishing a preponderance of equities in its favour. This is because an inherent equity attached to the respondent's claim to have his prior sale with a *bona fide* contracting party protected by law. See *BP Southern Africa (Pty) Ltd v Desden Properties (Pvt) Ltd supra* at 11 G-H; *Le Roux v Odendaal and Ors supra* at 444 D-E; the *Crundall Brothers* case *supra* at 135D. Put differently, it was for the second appellant to prove the special circumstances which rendered it inequitable to apply the maxim "*qui prior est tempore potior est jure*" in favour of the respondent.

Now ROBINSON J gave the most careful thought to all pertinent special circumstances. His reasons for giving effect to the first sale are reported at 66C-69G of the judgment. I do not propose to repeat them. Suffice it to state that I regard them as impressive. They reveal no ground justifying interference. Indeed every feature relied upon by Mr *Nherere* in support of the proposition that the remedy of specific performance ought to have been denied the respondent, had been raised before the learned judge and was convincingly answered.

Finally, Mr *Nherere* submitted, rightly in my view, that the learned judge should not have awarded costs against the first appellant. She was not the purchaser under the agreement of sale and transfer of the property was not registered

in her name. Therefore she ought not to have been cited by the respondent as a party to the proceedings.

In the result the appeal, insofar as it concerns the award of costs against the first appellant, succeeds with costs. Paragraph 3 of the order of the court *a quo* is accordingly amended by the deletion of the word "2nd". For the rest the appeal is dismissed, with costs to be paid by the second appellant.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Honey & Blanckenberg, appellants' legal practitioners

Mushonga & Associates, respondent's legal practitioners