Judgment No. HB 117/04
Case No. HC 1425/03
X-ref HC 1826 & HC 2718/03

WILLARD MUTUNGWAZI

Versus

SHAMISO NCUBE

And

THE CITY OF BULAWAYO

And

THE REGISTRAR OF DEEDS N.O.

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 MARCH AND 16 SEPTEMBER 2004

Ms A Masawi for the applicant
C Dube for the 1st respondent

Judgment

NDOU J: In HC 2718/03 this court ordered that the matters under cover of case number 1425/03 and 1826/03 be consolidated. The reason is the following. In HC 1425/03 the applicant sued the first respondent *ex contractu*. In HC 1826/03 the first respondent sued the applicant seeking the cancellation of the same contract that the applicant relies upon to found his cause of action in HC 1425/03. The salient facts are that on 25 February 2003, the parties entered into an agreement of sale in which first respondent sold her right, title and interest in movable property stand number 334 New Luveve, Bulawayo for the sum of $5,4 million payable in cash against transfer. The applicant was to obtain a loan from his employer for the said amount.

Through an addendum, the first respondent received from the applicant the sum of $300 000,00 on 28 February 2003. The sum was to be a refundable deposit.

The first respondent would refund this amount to the applicant when she received the purchase price. By agreement the applicant paid a further $500 000,00 to the first respondent for advertising charges and previous agents expenses and other related expenses in attempt to expedite the transfer process. The applicant applied for the above mentioned loan from his employer and his application was approved. Consequently, the applicant's employers wrote to the conveyancers undertaking to release the purchase price upon written confirmation from the latter that the transfer and their bond had been registered. This undertaking was made on 4 March 2003. On 11 June 2003, first respondent's legal practitioners wrote to the applicant's employer advising of the purported cancellation of the sale and asking them to nullify any steps that were being taken in pursuance of the agreement of sale. The reason given for that instruction was that the applicant had failed to meet his side of the bargain. This was a follow up to a letter that the first respondent had written to the Chamber Secretary of the second respondent on 14 April 2003 seeking to nullify the procedures that had already been concluded. In short, the first respondent seeks to resile from the agreement.

In a nutshell the applicant's case, on the one hand is that the disputed property must be transferred into his name because he has met his side of the bargain. He contends that, as provided in the agreement, payment would be effected only after the property has been transferred into his name. On the other hand, first respondent contends that without the misrepresentation by the applicant she would not have entered into the disputed agreement. Her case is that the applicant promised that the purchase price would be payable as soon as the sale has been accepted and confirmed by the Bulawayo City Council. She contends that she was aware at the time that the

application for title deeds and registering a mortgage bond over the property would take a long time. In these days of hyper-inflation, there is no way she would have accepted that payment be conditional to the registration of the mortgage bond over the property. In other words first respondent pleads a *justus* error which should vitiate the agreement.

The first respondent also raised a preliminary which I propose to deal with first. She submitted that this application raises serious material dispute of fact which cannot be resolved on the papers. The three disputes of fact relied upon are:-

(a) whether the parties had verbally agreed that payment of the purchase price would be made immediately after the registration of the cession with the Bulawayo City Council;

(b) whether first respondent was aware that the payment would only be made after the registration of title and mortgage bond over the property in favour of applicant's employers; and

(c) whether applicant made a serious and material misrepresentation which caused first respondent to sign the agreement in what could be described as a *justus* error to warrant that the agreement be vitiated.

Strictly speaking there is no issue as far as (b) is concerned as page of the agreement is explicit that the purchase price is payable against registration of the transfer. The only issues are whether this term was varied by a verbal agreement as alleged in (a) and whether the applicant misrepresented the facts to the first respondent as in (c). The agreement contains the usual term that it constitutes the entire contract between them [the parties] so the alleged verbal agreement in (a) has to be considered in that context. From the facts, the only dispute of fact is whether the

applicant misrepresented the facts to the first respondent as alleged in (c), *supra*. The substantive conflict on the papers related to whether the applicant misrepresented to the first respondent. It is trite that in applications (motion proceedings) a court should endeavour to resolve the dispute raised in affidavits without having *viva voce* evidence. It must take a robust and common sense approach and not an over fastidious one, provided that it is convinced that there is no real possibility of any resolution doing injustice to the other party concerned. There is a heavy onus upon an applicant seeking relief in motion proceedings, without the calling of evidence, where there is a bona fide and not merely an illusory dispute of fact – *Zimbabwe Bonded Fibreglass (Pvt) Ltd* v *Peech* 1987(2) ZLR 338(SC) at 339C-D; *Room Hire Co (Pty) Ltd* v *Jeppe Street Mansions (Pty) Ltd* 1949(3) SA 1155(T); *Lalla* v *Spafford NO & Ors* 1973(2) RLR 241(G) at 243B; *Masukusa* v *National Foods Ltd & Anor* 1983(1) ZLR 232 HC and *P T C* v *Mhaka* HH-127-03; *Mashingaidze* v *Mashingaidze* 1995(1) ZLR 219(H) and *Magwaza* v *Magwaza* HH-227-89. Taking a common sense and robust view of all the circumstances of the conclusion of the agreement, the two payments of $300 000,00 and $5 000 000,00 and the basis of the alleged misrepresentation, I hold the view that there was no misrepresentation as alleged by first respondent. Assuming I erred in the above finding, it still has to be borne in mind that not every misrepresentation entitled the "offended" party to resile from the agreement. It is well established that unless a misrepresentation is material, or in respect of a material fact, it will not justify the rescission of the agreement. A party who has been induced i.e. first respondent in *casu*, to enter into a contract by misrepresentation of an existing fact is entitled to rescind the contract provided the misrepresantation was material, was intended to induce him or her to enter into the

contract and did so induce him. In *Novick* v *Comair Holdings* 1979(2) SA 116(W) at 149-50 COLMAN J stated the elements that the party in the first respondent's shoes must prove in order to avoid a contract on the grounds of misrepresentation. They are:

(a) that the misrepresentation relied upon was made;

(b) that it was a representation as to a fact as opposed to a promise, prediction, opinion or estimate;

(c) that the presentation was false;

(d) that it was material in the sense that it was such as would have influenced a reasonable man to enter into the contract;

(e) that it was intended to induce the person to whom it was made to enter into the transaction sought to be avoided; and

(f) that the representation did induce the contract – *P T C* v *Mhaka supra*, at 4-5 of the cyclostyled judgment.

That, however, does not mean that the misrepresentation must have been the only inducing cause of the contract, it suffices if it was one of the operative causes which induced the representee to contract as he/she did. If I had found the existence of misrepresentation, it seems to me that I would, in all probability, have found that all the elements in (a) to (f) have been established. As already alluded to above, there is no *bona fide* dispute of fact that cannot be resolved on the affidavits. The agreement of sale was drafted with assistance of third party, a Mr Tshabangu who works at a reputable estate agent. It is not clear whether he did so within or out of the scope of his duties at the estate agency. The sale was conditional upon the applicant "being offered a loan on the usual terms and conditions from a Bulawayo

Society or other financial institutions, … subject to the sellers' approval, in the sum of $5 400 000,00 (loan from NSSA)". This special condition, prevails over the general conditions according to the terms of the agreement. The applicant applied for a loan and his application was approved. (The employer's written undertaking is filed of record). In this regard the applicant has complied to the letter with the provisions of the agreement. To date the applicant has not withdrawn his application and neither has his employer withdrawn their undertaking. As the applicant has done his part and, as of the date of undertaking by his employers, NSSA, to release the purchase price, first respondent ought to have tendered transfer. She, however, wants to vitiate the agreement on the basis of material representation allegedly committed by the applicant. It is trite that the first respondent by her conduct in putting her signature to a document admits that she is acquainted with its contents. The admission is not of course conclusive but is sufficient to establish that fact *prima facie – Glen Comeragh (Pty) Ltd* v *Colibri (Pty) Ltd and Anor* 1979(3) SA 210(T). The effect of appending a signature is, in general, that the party in question is bound by the ordinary meaning and effect of the words which appear over his/her signature – *Burgerv Central South African Railways* 1903 TS 571 at 578; *Glenburn Hotels (Pty) Ltd* v *England* 1972(2) SA 660 (R, AD) at 663; *Du Toit* v *Atkinsons Motors Bpk* 1985(2) SA 893(A) at 903F-905C and *The Principles of the Law of Contract* A J Kerr 4Ed at 86-90. This rule is applied not only when the person signing studies the document but also when he appends his signature carelessly or recklessly and when he/she fails to avail himself/herself of an opportunity to study provisions incorporated by reference. By signing the first respondent was taking the risk – *Bhikhagee* v *Southern Aviation (Pty) Ltd* 1949(4) SA 105E; *Mathole* v *Mathole* 1951(1) SA 256(T); *George* v *Fairmead*

(Pty) Ltd 1958(2) SA 465(A) and the *Glenburn Hotels* case, *supra*. The first respondent appreciated this general rule. She, however, relies on one of the exceptions to this rule. These exceptions were captured by the learned author A J Kerr, *supra* at page 87 as follows:

"This rule is not applied –

(1) if the person who signs does not understand the terms of the document and is neither careless nor reckless, or

(2) if there is an *error in negotio*; or

(3) if the purported party who understood the words in the document in their ordinary meaning 'knew or had reason to know, that the [other purported party] misapprehended the terms of the contract, but left him under such apprehension; or

(4) if the person signing was misled of the words to which he was thus signifying his assent, misled, that it, by the other party" – *Logan* v *Beit* (1890) & SC 197 at 215; *Spindrifter (Pty) Ltd* v *Lester Donovan (Pty) Ltd* 1986(1) SA 303(A) at 316B-C and George's case *supra.*

As I understand the first respondent's case she is relying on exception under (4). I say so because the agreement is categoric on when and how the purchase price was payable. On page 2 under the heading of "Purchase Price and Terms of Payment" the purchase price was payable "against registration". It does not say that the purchase price is payable" as soon as change of ownership is confirmed by the Bulawayo City Council" within fourteen days. The first respondent, in her founding affidavit, and her witness, Regis Mudara, in his supporting affidavit stated that the

applicant misled the first respondent as to the purport of the words to which she was signifying her assent. In both their affidavits both exhibit a clear understanding of the conveyancing and registration process of the type of property subject matter of this dispute. If they had read the agreement, before the signing, they probably understood that payment would be made against registration and not consent to the cession by the local authority. In the papers the first respondent contradicted first, herself and second Regis Mudara on the period within which payment was due. First, in her letter dated 14 April 2003) she says "… The time frame agreed has also lapsed. The purchaser had also promised that payment would be done in (3) three weeks all of which have not materialised." (emphasis added). In paragraph 2.2. of her founding affidavit she says – "… the applicant misrepresented to me as I was made to believe that the employer would process the loan application as soon as written agreement of sale is submitted and that I expect payment as soon as a written agreement of sale is submitted and that I expect payment as soon as change of ownership is confirmed by the Bulawayo City Council which is normally through within fourteen (14) days of the signing of the cessionary letter …" (emphasis added) Third, in the letter addressed to the applicant, through her legal practitioners, she says –

> "You had undertaken to pay the purchase price within two weeks of the agreement of sale. It has become apparent to our client that you have had misrepresented facts on this issue." (emphasis added). Fourth, in Mudara's affidavit it is said – "The applicant indicated that payment of the purchase price was to be done in about (14) fourteen days time by loan from his employer as soon as the City Council confirms transfer, but not on registration at the Deeds Office." (emphasis added)

Such inconsistances and what I have already alluded to above point in direction of absence of misrepresentation. The first respondent, on a balance of probabilities, failed to lay a foundation for rescission of the agreement.

I, accordingly dismiss the first respondent's (applicant in HC 1826/03) application in HC 1826/03 with costs and in HC 1425/03 order as follows:-

1. The agreement of sale entered into by the applicant and the first respondent for the sale of stand number 334 New Luveve, Bulawayo be and is hereby declared binding and of full force and effect.
2. The first respondent be and is hereby directed to transfer the property known as 334 New Luveve, Bulawayo to the applicant, failing which the Deputy Sheriff, Bulawayo be and is hereby authorised to sign the necessary papers to effect transfer at the second and third respondents' offices respectively.
3. The first respondent be and is hereby directed to give occupation of the said property to the applicant upon registration of the transfer against payment of full purchase price, failing which the Deputy Sheriff, Bulawayo be and is hereby authorised to eject the first respondent and all those claiming occupation through her from the property and give occupation to the applicant.
4. The first respondent to bear costs of suit.

Masawi & Associates, applicant's legal practitioners
Dube & Partners, first respondent's legal practitioners