Judgment No. HB 129/2004
Case No. HC 1825/02
X-Ref: HC 2476/02 & 1633/03

ROSEMARY SINGINI N.O.
(in her capacity as executor of the estate
of Singini Zamani)

versus

S M MEIKLE

and

NATIONAL EXECUTOR AND TRUST (PVT) LTD

And

HOLLAND REDFERN (PVT) LIMITED

And

REGISTRAR OF DEEDS - BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 20 JULY & 2 DECEMBER 2004

Adv. L Nkomo for the applicant
Adv. T Cherry for the respondents

Judgment

CHEDA J: On 19 July 2002 Singini Zamani during his life time filed an urgent application seeking to interdict 1st, 2nd, and 3rd respondents from concluding an agreement of sale over stand number 16 Kingsdale Ave, Queensdale, Bulawayo with a third party and further interdicting 4th respondent from effecting transfer of the said stand to a third party in the event that 1st, 2nd, and 3rd respondents have already concluded an agreement with a third party. Applicant is now being represented by his wife Rosemary Singini. As the matter appeared urgent I granted the provisional order on 22 July 2004 and the matter was opposed and subsequently argued.

First respondent is a director of 2nd respondent while 2nd respondent is a duly registered company based at Lincoln Inn, 113B J Tongogara St, Bulawayo. Third respondent is a registered estate agent carrying on its business also in Bulawayo. Fourth respondent is the Registrar of Deeds Bulawayo, and under whose jurisdiction stand number 16 Kingsdale is situated.

It is not in dispute that applicant was a tenant of one Francois De Lange by virtue of a lease agreement signed by both parties in September 1992 to the time of De Lange's death. The lease agreement filed was signed by one party only, i.e. the lessor. It is not clear why the lessee did not sign but, however, the parties continued to regard it as binding notwithstanding.

According to applicant after the death of De Lange, the property was then taken over by 1st and 2nd respondents. Second respondent through 1st respondent advised applicant to liaise with 3rd respondent who are the estate agents, if he was still interested in the property. Suffice to say that applicant had a right to first refusal over this property in the event that De Lange wanted to sell it.

In April 2002, 3rd respondent invited him to exercise his option of first refusal by making an offer. He made an offer of $2,6 million which was turned down and asked him to up it to $3million either by cash or loan. On 5 July 2002 applicant received a call from a Mr Mukono of 3rd respondent who advised him that they had received an offer of $3 million for the said property, he confirmed that he would match the offer. Mr Mukono then advised him that he would have to attend at their offices to sign an agreement of sale but he would have to wait for a few days as the agreement had to be drawn. He was advised that an offer be made in writing which was done on 9 July and he accepted the offer on 15 July 2002. In that letter applicant

advised that the agreement be drawn up in order to enable him to access funds for the purchase of this property. On 15 July 2002 he visited 3rd respondent's office whereupon he was advised by Mr Mukono that 3rd respondent wanted the sum of $3 million by 4.30 p.m that day. He protested at this demand as he had previously written to them asking them to draw up an agreement of sale but to no avail. On 17 July 2002 he instructed his legal practitioner to write a letter to 2nd respondent and copied it to 3rd respondent raising the same issue but no response was received by his legal practitioner. It is his further evidence that from the beginning of July 2002, there had been a number of people visiting the property for viewing purposes obviously with a view to purchase it. It is for this reason that he ended up approaching this court for relief.

First respondent flatly denies material knowledge surrounding the transaction in this matter. She acknowledges that indeed applicant and his wife approached her with a view of purchasing the said property and she referred them to a Mr Bowes of 3rd respondent.

Adv. T Cherry for 1st, 2nd and 3rd respondents has argued on behalf of 1st respondents, that she had no major role to play in this matter at all as she was concerned with was rentals from applicant and with regards to the sale of the property this was 3rd respondent's domain. I do not agree with *Adv. Cherry* that she is not part of this dispute. I find as a fact that applicant has always been interested in purchasing the property. On 9 July 2002 1st respondent using 2nd respondent's letter head and in her position as Director wrote a letter to applicant advising him of where applicant should pay his rent and at the same time advising him of the offer of $3 million from a prospective buyer. In the same letter she asked him to match that offer. It is pertinent

to note that no deadline of the offer was given. This paragraph clearly shows that 1st respondent is part of this dispute and therefore her financial interest in this matter is unquestionable. She, therefore, can not be heard to protest when she is being cited as party to these proceedings.

The second respondent is responsible for the winding up of the estate. *Adv. Cherry* has attacked the improper citation of 2nd respondent in that it should have been Robert Malcolm Maggillivray Bowes in his capacity as Director of National Executor and Trust (Pvt) Ltd. While this is correct, it is in my view a minor omission which does not take the argument very far and I therefore condone such omission in the interest of justice.

It is noted that both 1st , 2nd and 3rd respondents were involved in the sale of this property although at the 11th hour 1st respondent seems to shift the duty to 2nd respondent and 2nd respondent in turn turns the tables against 3rd respondent.

On 15 July 2002 applicant wrote a letter to 2nd respondent offering $3 million and went further to ask respondents to draft an agreement of sale. Second respondent did not respond to that letter.

However, first respondent in her letter of 17 April 2002 to applicant and his wife stated in the 4th paragraph …

> "Please ensure that you have sufficient funds on hand to deposit 10% of the sale price with the Estate Agents on signing of (sic) any documents. We as executors would require a leter of guarantee from the company granting you mortgage loan facilities if the full offer was not to be a cash offer. We do not sell properties under a Deed of Sale. (the underlining is mine)"

It is a fact that both 2nd and 3rd respondents exhibited signs of non-committal in concluding the contract between applicant and 3rd respondent. Having advised

applicant that he should match the offer of $3 million which he did on 15 July 2002 they were, however, still not prepared to draft an agreement of sale, a fact which they had always known that applicant would require one, as is obvious in 1st respondent's letter of 17 April 2002. All of a sudden they wanted applicant to raise $3 million cash within 48 hours. Their conduct with all respect, was clearly *mala fide.* It has to be understood in that context in light of the fact that they had already accepted an offer from a Mr Ncube.

Whatever, reason they had for changing their minds, they cannot be allowed to do so because a valid contract had already been concluded with applicant. Mr Bowes ignored applicant's letter of 15 July 2002 and also that of applicant's legal practitioner of 17 July 2002. He has not endeavoured to explain away his behaviour, and in the absence of any explanation I can only attribute this behaviour to either sheer ignorance of a simple office procedure of acknowledging correspondence or stubbornness. Unfortunately whatever reason it was does not help him as he is indeed liable for this problem.

As I stated above all the 3 respondents where working together in this matter and it is their conduct which resulted in frustrating applicant. In my view, applicant has performed his part of the contract by exercising his right of refusal and also by matching the offer of $3 million within a reasonable time. Having so done he was entitled to specific performance by 1st, 2nd and 3rd respondents jointly and severally. Entitlement to specific performance was ably stated by INNES J in *Farmers' Co-op Society* v *Berry* 1912 AD 343 at 350.

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson* v *Pullinger* (10R at page 301), "the right

> of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt". It is true that courts will exercise a discretion in determining whether or not decrees of specific performance should be made. They will not of course, be issued where it is impossible for the defendant to comply with them …"

Applicant has proved on a balance of probabilities that respondents owe him a duty to perform that part of their bargain. See also *Patel* v *Greek Films P/L* 1973 (1) RLR 180 at 181G-H.

It is a fact that applicant has been occupying this property since September 1992 and as such he regarded it as his permanent home. Even if he is now deceased his surviving spouse regards it as such. He did so before this matter was finalised, his failure to take transfer was not because of his fault but that of respondents who developed unreasonable attitude towards him and thus frustrated all his efforts of owning a home. Courts have a discretion in ordering specific performances. In *casu* specific performance in my view is the most suitable remedy as it is possible of execution. Damages will not conveniently place applicant in his rightful place. To order otherwise would result in an undue hardship on the applicant. The balance of convenience therefore favour applicant in this case.

This then brings us to the issue of costs. Applicant has asked the court to visit respondent with costs on a higher scale.

The general rule is that costs follow the event, see *Pelser* v *Levy* 1905 TS 469; *Commissioner of Inland Revenue* 1925 AD 298; *Pretoria Garrison Institutes* v *Darnish Variety Products* 1948 (1) SA 839; *Valkin and Another* v *Daggafotein Miners Ltd & Others* 1960 (2) SA 507 (W). It is trite that this rule should be departed from only when good grounds for doing so exist. This is the law. However, applicant is asking for costs at a higher scale. The legal position is that attorney and client costs

will usually not be granted when they have not been prayed for or when the other party has not been so notified. The leading case as to attorney and client costs is that of *Waterberg Landbouwers Ko-operatiewe Vereniging* 1946 AD 597, at 607 where TINDALL JA stated-

> "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 or 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 to him by the litigation."

These courts will not lightly grant an order for costs as between attorney and client. The rationale for this approach is that courts are open to all litigants to bring their complaints, therefore they should not be penalised if they are misguided in bringing hopeless cases before the court, see *Mossa* v *Lalloo* and another 1957 (4) SA 207(D). However, if a litigant brings a case in court and the court is satisfied that he lacks *bona fides* in the said process, then and only then will the court show its disapproval by ordering costs on a superior scale. See *Moosa* v *Mahomed* 1939 TPD 271 at 281. It is applicant who brought this application. The reason for doing so was because all respondents were now reneging on the agreement on the pretext that he had failed to meet the deadline. However, it will be unjust to allow them to benefit from their wrongful actions being that they did all they could to prevent applicant from performing his side of the contract.

It is my view that respondents were jointly working together to frustrate applicant for reasons which are not entirely clear. It was clearly dishonest of them and it is for this reason that they should pay applicant his costs as between attorney and client scale.

The following order is made:

1. That the provisional order granted by this honourable court on 22 July 2002 be and is hereby confirmed.
2. That the 1st, 2nd and 3rd respondents jointly and severally one paying the others to be absolved be ordered to pay costs for this application on an attorney and client scale.

Cheda & Partners applicant's legal practitioners
Ben Baron & Partners respondents' legal practitioners