Judgment No. HB 23/2004
Case No. HC 3634/2001

DONALD IAN PIKE

Versus

ELJON BAKERY (PVT) LTD

And

DEPUTY SHERIFF – BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 29 NOVEMBER 2002 AND 25 MARCH 2004

K Phulu for applicant
N Siphuma for respondent

Opposed Application

NDOU J: The applicant seeks an order in the following terms:

"It is ordered that:

1. First respondent be and is hereby ordered to take reasonable steps to effect transfer into the applicant's name within (14) fourteen days of this order being served on it;
2. First respondent is ordered to collect the purchase price from the applicant's bankers Founders Building Society being an amount of $120 000,00.
3. The Deputy Sheriff is ordered in the event that the first respondent fails to collect the purchase price from the applicant's bankers and deliver it to the first respondent and to sign whatsoever papers in order to effect transfer of the property.
4. Costs of suit."

The first respondent opposes the application. Most facts are common cause or at least beyond any material dispute. On or about 9 July 1996, applicant and first respondent entered into a written agreement of sale in respect of a flat known as Number 8 Twin Flats, Josiah Tongogara Street, Bulawayo. As alluded to above, applicant now seeks transfer of the said property in terms of the said written agreement. The first respondent refuses to effect transfer as it alleges that it cancelled the agreement during mid-September 1996 and alludes to a cancellation letter which is not attached to the application. The first respondent further alleges that the communication of the cancellation of sale was communicated to applicant's agents Rodor Properties (Pvt) Ltd. Desire Phillips, first respondent's representative, says in her affidavit – "There is no agreement of sale because I communicated cancellation of the sale to his agents, viz Rodor Properties (Pvt) Ltd in September 2996." She however, did not attach her letter or notice of cancellation. Instead, she attached a letter, dated 13 September 1996, written by Rodor Properties to the first respondent which reads:

> "We refer to the above matter and confirm that the purchaser has obtained his loan from Founders Building Society.
> However we understand that you have contacted Mrs I Sales of Calderwood Bryce Hendrie & Partners and that you no longer wish to proceed with the transfer.
>
> Please confirm your instructions to Mrs Sales and we advise that should you cancel the sale we will account to your attorneys for our commission of $4 000,00 in terms of your mandate to us and our instruction of a willing and able purchaser."

According to the agreement of sale the first respondent, as seller, can only cancel the agreement if the purchaser defaults in complying with any clause of the agreement and fails to remedy same within seven days of a written notice to do so. It is beyond dispute that the first respondent did not give the applicant such a written

notice, as envisaged in clause 6(ii) of the agreement specifying the part of the agreement that the latter breached and giving him an opportunity to rectify same within seven days. Even in the first respondent's papers there is no allegation of any breach. I believe Mr *Siphuma*, for the first respondent, appreciated this dilemma, because in the heads of argument, the first respondent's position is that there is no obligation on it to inform the applicant of the cancellation once a suspensive condition had not been fulfilled. It is further submitted that the applicant failed to comply with clause 2 of the agreement in that he could not obtain the purchase price on or before 29 August 1996.

There is merit in the submission insofar as it relates to the statement of the law. It is, however, not applicable in this case. The first respondent, in its affidavit, never alleged that the applicant failed to obtain the purchase price on or before 29 August 1996. This is being introduced for the first time in the heads of argument. What was averred in the first respondent's opposing affidavit is insufficient to constitute a defence hence this desperate attempt to introduce new evidence via the heads of argument. This is a typical problem in opposed applications. This is not proper. In this regard I associate myself with the words of MILLER J in *Hart* v *Pinetown Drive-In Cinema (Pty) Ltd* 1972 (1) SA 464 (D) a 469 C-E. The learned Judge said –

> "… where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound."

Put in another way, the affidavit constitutes not only the evidence but also the pleadings and, therefore, these documents should contain, in evidence they set out, all that would have be necessary in a trial. In *SA Diamond Workers' Union* v M*aster Cutters' Association of SA* 1948 (2) PH A 83 (T) at 283, MILLIN J said –

> "When trial proceedings are replaced by motion proceedings, the affidavits are the evidence, but the affidavits are also the pleadings and while of course, it is not necessary that the petition should set out a formal declaration or a reply affidavit set out a formal plea these documents should contain, in the evidence they set out, all that would have been necessary in a trial."

In the opposing affidavit there is no averment by the first respondent that the applicant failed to obtain the purchase price on or before 29 August 1996 and there is therefore, no evidence to that effect – *Triomf Kunsmis (Edms) Bpk* v *A E & C I Bpk en Andere* 1984 (2) SA 261 (W). In *Saunders Valve Co Ltd* v *Insamcor (Pty) Ltd* 1985 (1) SA 144 (T) at 149 (C) GOLDSTONE J said –

> "In motion proceedings the affidavits constitute both the pleadings and the evidence."

The non-disclosure in *casu*, is material. I should, however, point out that the first respondent is entitled to make any legal contention open to it provided it is on the facts as they appear on the affidavits. The first respondent's legal contention, in *casu* is not premised on the facts as they appear in the affidavits – *Simmons No* v *Gilbert Hammer & Co Ltd* 1963 (1) SA 897 (N). On the contrary, it seeks to introduce new material averments under the guise of legal contention. All along the basis of it defence has been that the agreement of sale was cancelled in mid-September 1996, and not that the agreement itself was void *ab nitio* on account of the applicant's failure to meet a suspensive condition. In light of the above I find that the agreement of sale was not validly cancelled by the first respondent. As alluded to above no

written notice in terms of clause 6(ii) was given to the applicant. In any event the first respondent in its affidavit does not state the type of breach by the applicant, and that applicant was given the agreed seven days to rectify the same and he failed to do so. Further, the applicant, in the agreement chose number 9 Daneth Court, Main Street, Bulawayo as his *domiilium citandi et executandi*, yet the fifth respondent served the so-called letter of cancellation elsewhere i.e. Rodor Properties. The requisite notice that is not served at the *domicilium citandi et executandi* is of no force.

In order to be entitled to transfer the applicant has to fulfil the following obligations in terms of clauses 2, 3 and 6 of agreement of sale as read together. First, he has to obtain a loan against the registration of a first mortgage bond over the property, for the sum of $100 000,00 with a building society or other financial institute on or before 9 August 1996. Should a lesser amount of loan be offered the applicant has the right to make up the difference in cash. Second, the applicant shall furnish the first respondent's convenyancer within fourteen days of the said conveyancer's request the amount of all the costs of transfer and any other costs for charges that may be due to him.

From the papers filed by the applicant I am satisfied that the applicant has fulfilled his obligations, in particular, he managed to secure a loan and has paid all the transfer fees as envisaged by the agreement. In the circumstances, the applicant is entitled to transfer – *Bader & Ano* v *Weston & Ano* 1967 (1) SA 134 (C) at 136-7 and *The Winterburg Agricultural High School* v *Premier of the Eastern Cape & Ors* 1996 (3) SA 775 (SCA) at 779-780.

I therefore order that:

1. First respondent be and is hereby ordered to take reasonable steps to effect transfer of an undivided 16.7% share known as share number 8 being the remaining extent of stand 663, Bulawayo, also known as Number 8 Twin Flats, Josiah Tongogara Street, Bulawayo into the applicant's name within (14) fourteen days of this order being served on it.
2. First respondent is ordered to collect the purchase price from the applicant's bankers, Founders Building Society being an amount of $100 000,00.
3. In the event that the first respondent fails to comply with the order in paragraph 1 above the Deputy Sheriff, Bulawayo, is ordered to collect the purchase price from the applicant's bankers and deliver it to the first respondent and, thereafter, to sign whatsoever paper in order to effect transfer of the said property, being an undivided 16.7% share known as share number 8 being the remaining extent of stand 663 Bulawayo, also known as number 8 Twin Flats, Josiah Tongogara Street, Bulawayo.
4. The costs of this application be borne by first respondent.

Coghlan & Welsh applicant's legal practitioners
Sansole & Senda first respondent's legal practitioners