Judgment No. HB 109/06
Case No. HC 257/04
X Ref 1863/04 & 1783/04

NEVER DUBE

Versus

MUTSAYI JOSEPH NYAGUZE

And

BOBBY ZVINAVASHE

And

ETHEL MAPFIDZA

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 4 JULY 2005 AND 19 OCTOBER 2006

Advocate P Dube for the appellant
Advocate R M Fitches for the respondent

Opposed Application

NDOU J: This matter covers issues arising from cases number HC 257/04 and HC 1863/04. Both these applications involve an immovable property, namely 67005, Sizinda, Bulawayo. The matters involve two agreements of sale entered into in respect of this property on different dates by the applicant and 1st respondent on the one hand, and by the 2nd and 3rd respondents and 1st respondent on the other. For these reasons, by agreement, the two matters were argued together and this judgment is in respect of both HC 257/04 and HC 1863/04.

The background facts of the case are the following. In HC 257/04 the applicant filed an urgent application against the 1st respondent only. Applicant was at the time, very much aware of the interest that 2nd and 3rd respondents had in the matter

but chose not to cite them for reasons that are not entirely discernible from his papers. Be that as it may, the basis of his application is captured in paragraphs 3 to 8 of his founding affidavit which I propose to quote:

> "3. In or about the 9th day of October 2003, I entered into a written agreement of sale with the respondent for the cession of respondent's rights in 67005, Sizinda, Bulawayo. This agreement of sale appears hereto as annexure "A". The agreement of sale is still VALID and was not cancelled.
> 4. The purchase price was $25 000 000,00 (Twenty-five million dollars) and a deposit of $14 000 000,00 was paid as follows:
> (a) $7 000 000,00 paid directly to the respondent [paid on 9 October 2003].
> (b) $7 000 000,00 paid directly to Lazarus and Sarif. See paragraph 2(a) of the said agreement of sale [$6 000 000,00 was paid on 15 October 2003].
> 5. According to paragraph (b) and (c) of the agreement of sale the balance of $11 000 000,00 was to be paid on or before the 30th day of October 2003 and on or before the 6th day of December 2003 respectively.
> 6. However, applicant has since paid the property in full and now that respondent is no longer interested in change of ownership. See copy of receipt of payment hereto attached marked annexure "B" –"C".
> 7. I was however alarmed to received a letter from Sibusiso Ndlovu through my the then [*sic*] legal practitioners … addressed to Lazarus and Sarif a copy hereto attached…
> 8. As will more fully appear from the Memorandum of Sale entered into between respondent and Boby Zvinavashe and Ethel Mapfidza dated the 8th day of October 2003, respondent has already sold the property to the other parties … This is clearly in breach of the agreement of sale annexure "A" hereto."

This is the foundation of the application in HC 257/04. As a result of this foundation the applicant obtained a provisional order in this court on 18 February 2004. He now seeks that a final order be confirmed in the following terms:

> "1. Respondent be and is hereby ordered to sign the relevant papers to effect cession of immovable property known as No. 67005 Sizinda, Bulawayo to the applicant.
> 2. In the event that the respondent fails to do as ordered the Deputy Sheriff be and is hereby ordered to sign those papers on his behalf.
> 3. Respondent to pay costs of this application only if he opposes the grant of this order."

In HC 1863/04, 2nd and 3rd respondents are 1st and 2nd applicants respectively. 1st respondent is also 1st respondent, with the applicant as the 2nd respondent and 4th respondent as the 3rd respondent. In the latter application, the 2nd and 3rd respondents (as co-applicants in the matter) seek an order in the following terms:

"It is hereby ordered that:

i) First respondent be and is hereby ordered that he, within seven(7) days of this order being made, sign all the documents necessary to effect transfer of stand number 67005 Sizinda, Bulawayo Township to the first and second applicant.
ii) The third respondent, through its appointed official, to in its turn, sign all documents and papers to effect the transfer of the said property held under Title Deed No. 123381 from the first respondent to the applicants.
iii) Should the first respondent fail or refuse to sign the documents to effect the transfer of the said stand to the applicants as aforesaid, then the Deputy Sheriff be and is hereby directed and authorised to sign the said documents in the first respondent's stead.
iv) The respondents pay the costs at an attorney-client scale jointly and severally, the one paying the other to be absolved, only if they oppose this action."

The 2nd and 3rd respondent's version, confirmed by the 1st respondent and the contents of both agreements of sale, is that their agreement was first in time and they therefore have stronger rights that the applicant – *est tempore potior est jure*, loosely translated "He who is first in time has the strongest claim – see also *McKeurtan Sale of Goods in South Africa* (5th Ed) at page 32 paragraph 3.3.1 (C). A mere reading of the two agreements shows that applicant's agreement was signed a day after the one involving 2nd and 3rd respondents with the 1st respondent i.e. 9 October 2003 and 8 October 2003 respectively.

The applicant realised, after the filing of opposing papers by the 1st respondent [and the application in HC 1863/04] that on the face of the papers, legally he had no leg to stand on, so to speak. He dealt with dilemma in the answering affidavit. He

then altered his position by making confusing assertion stating that his agreement of sale was before 9 October 2003. The applicant's assertions in the answering affidavit are that he entered into agreement with the respondent "as early as March 2003" when the paid lawyers on behalf of the 1st respondent. He said he also paid "towards the drafting of an agreement of sale" on 5 May 2003. All these material assertions ought to have been made in the founding affidavit. It is trite that all the necessary allegations upon which the applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the founding affidavit by adducing supporting facts in an answering affidavit. This is, however, not absolute rule for the court has a discretion to allow new matter in an answering affidavit. The answering affidavit may, in appropriate circumstances, be allowed to contain matter which might better have been included in the applicant's founding affidavit. If facts in the answering affidavit are facts which a Judge requires to know in order to arrive at a just decision it would be wrong to order that they be expunged from the record simply because there has not been a strict compliance with the Rules, provided, of course, that there is no prejudice to the other party – *Rice* v *Rice* 1957 R & N 514 (SR) and *Reiter* v *Beierberg & Ors* 1938 SWA 18. But a distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's opposing affidavit reveal the existence or possible existence of a further ground for relief sought by the applicant. In the latter scenario the court would obviously more readily allow an applicant in his answering affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom. The court will, however, not allow the

introduction of new matter if the new matter sought to be introduced amounts to an abandonment of the existing claim and the substitution therefore a fresh and completely different claim based on a different cause of action – *Sheperd* v *Mitchell Cotts Sea Freight (SA) (Pty) Ltd* 1984(3) SA 202(T) at 205E; *Bowman NO* v *De Souza Roldao* 1988(4) SA 326(T); *Pienar* v *Thusano Foundation* 1992(2) SA 552(B); *Johannesburg City Council* v *Bruma Thirty Two (Pty) Ltd* 1984 (4) SA 87(T). The court will not permit an applicant to make a case in answering affidavit when no case at all was made out in the founding affidavit – *Poseidon Ships Agencies (Pty) Ltd* v *African Coaling and Exporting Co (Durban) (Pty) Ltd* 1980(1) SA 313(D) at 316A and *Superior Court Practice*, H J Erasmus at B1-45 to B1-46. These principles apply to the facts of this case. The respondents have not alleged any prejudice that may be occasioned by the admission of the new evidence in the answering affidavit. They have, luckily for the applicant, made a reference to the issue in passing. Instead, the respondent chose to deal with cumulative effect of the evidence emanating from both the applicant's founding and the answering affidavits. I will admit the new evidence introduced in the answering affidavit. Although the assertions in the answering affidavit are confusing, what emerges is that there were "to and fro" negotiations between applicant and 1st respondent resulting in a written agreement being signed on 9 October 2003 between these parties. This agreement had a new price. 1st respondent received and utilised $3 300 000 and other amounts have been paid to his legal practitioners for his account.

1st respondent refers to the applicant demanding the $3 000 000 from him. The applicant states that this sum was part of an earlier purchase price, therefore this suggests that the applicant was seeking refund, and this militates against assertions of a binding earlier sale. The refund is consistent with a cancellation of the contract or negotiations. As such, the contract signed by the applicant and the 1st respondent on 9 October 2003 would have been a product of negotiations.

In paragraphs of the answering affidavit the applicant states:

> "6. He eventually came up with a new story. If I wanted the property he said, the price had to be reviewed upwards. He now wanted $10 000 000,00. He had already taken over $3 million from me. I agreed to the new price …"
> 7. …
> 8. …
> 9. …
> 10. Mr Nyaguze [1st respondent] had in the meantime become impatient with waiting and I was also refusing to release the balance of the purchase price. He again raised the issue of the purchase price. He was saying the value of the dollar had depreciated and he could not still accept $10 million. That is when the new price of $25 million was arrived at and we then signed the agreement of sale dated 9th October 2003.
> 11. …
> 12. …
> 13. This is false. The new price of $25 million was the third price that we agreed upon with Mr Nyaguze …" (emphasis added)

From these extracts it appears, on the one hand that the parties were still negotiating. And on the other hand, applicant gives the impression there were agreements that were novated. The existing obligation [of payment of the purchase price] was expressly agreed by the parties. There seems to be a new obligation by way of a formal contract dated 9 October 2003. The parties expressly agreed to a new price and new terms of payment – *Acacia Mines Ltd* v *Boshoff* 1958(4) SA 330 (AD) and *Trust Bank Africa Ltd* v *Dhooma* 1970(3) SA 304(N). But do such transactions

constitute novation? In my view, they don't. In *Law of Novation* by L R Caney at page 24 the learned author correctly observed:

> "According to Pothier [para 559], the following transactions will be taken to be not novations but modifications of the earlier obligations unless the contrary be clearly expressed; namely:
>
> i) Agreement for extension of time for payment of an existing debt. The common-law authorities are discussed in *Estates Liebenberg* v *Standard Bank of SA Ltd* 1927 AD 502 …
> ii) Agreement involving change of place of payment.
> iii) Agreement authorising payment to some person (*adjectus solutionis causa*) other than the creditor – *Cassim* v *Latha* 1930 TPD 659.
> iv) Agreements involving the acceptance of something else than the sum due.
> v) Agreement involving the payment by the debtor of a larger sum than is due.
> vi) Agreement involving the acceptance by the creditor of a smaller sum than is due – *Bergl* v *Colonial Government* (1906) 23 SC 112 …"

There is no clear evidence that the 1st respondent and the applicant intended to novate, i.e. the *animus novandi*, beyond the above-mentioned modifications. In fact, beyond the price, there is no evidence on the full terms of the alleged earlier agreements. In my view, the mere fact that the terms of an already existing oral contract are reduced to writing does not mean that one contract is "replaced" by another. Replacement or novation may only occur if the parties intend to alter the terms of their contract, and, in changing the <u>form</u> and the <u>contents</u> of the agreement also – *The Principles of the Law of Contract* A J Kerr (4th Ed) at 117 – *Goldblatt* v *Freemantle* 1920 AD 123; *Trust Bank of Africa Ltd* v *Cotton* 1976(4) SA 325(N); *Leyland (SA) (Pty) Ltd* v *Rex Evans Motors (Pty) Ltd* 1980(4) SA 271 (W); *Spiller and Ors* v *Lawrence* 1976(1) SA 307(N) and *Magwaza* v *Heenan* 1979(2) SA 1019(A) at 1026E to 1028A. When did contract between applicant and 1st respondent

come into existence then? Once the parties have decided that they will reduce their contract to writing and that they will be bound by their written contract but not by any earlier informal contract, then the contract comes into existence when, and only when, the written document containing it has been signed by both parties – *Hadingham* v *Carrutlers* 1911 SR 33 at 38 *Goldblatt* v *Freemantle, supra,*; *Patrikios* v *The African Commercial Co. Ltd* 1940 SR 45 at 56-7; *Meter Motors (Pty) Ltd* v *Cohen* 1966(2) SA 735(T) at 763-7 and *The Law of Contract in South Africa* by R H Christie at 91-94. This legal principle is fundamental in the determination of the issue between the parties. First in this case, the applicant and 1st respondent decided that they will reduce their contract to writing. This is clear from the evidence of the applicant in paragraph 6 of his answering affidavit where he states:

> "6. I agreed to the new price and <u>also said to him we should go to his legal practitioners for an agreement to be drafted.</u> …" (emphasis added)

It is further clear from their written contract that they agreed that they be bound by their written agreement but not by an earlier informal contract. This evinced by clause 10 of the written contract which provides:

> "10. The parties acknowledge that this agreement constitutes the entire contract between them and no other terms, conditions, stipulations, warranties or representations whatsoever have been made by either party, their agent or agents other than such as incorporated hereto."

In *Burger* v *Central South African Railways* 1903 TS 571 at 578, INNES CJ stated –

> "It is a sound principle of law that a man, when he signs a contract, is taken to be bound by the ordinary meaning and effect of the words which appear over his signature." – See also *Glenburn Hotels (Pty) Ltd* v *England* 1972(2) SA 660 (R, AD) at 663; *Du Toit* v *Atkinson's Motors Bpk* 1985 (2) SA 893 (A) at 903F-905C.

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 fails to avail himself of an opportunity to study provisions incorporated by reference. In such circumstances the person signing can be considered as taking the risk – *George* v *Fairmead (Pty) Ltd* 1958 (2) SA 465 (A) and *The Principles of the Law of Contract*, *supra,* at 86-7. In the circumstances, I find that the contract between applicant and 1st respondent only came into existence when the written document containing it was signed by both parties on 9 October 2003. In passing, I note that this is an "instalment sale of land" as defined in section 2 of the Contractual Penalties Act [Chapter 8:04] because it requires payment by way of a deposit of $14 000 000 payable on signature and two instalments payable on 30 October 2003 and 6 December 2003 respectively. Section 7 of the Act requires it to be in writing. This issue was not raised by either party so I will not evoke it in order to resolve the issue here. It is common cause that this is a double sale situation. In *B P Southern Africa (Pty) Ltd* v *Desden Properties (Pvt) Ltd & Anor* 1964 RLR 7 (HC) (SR) it was held that the policy of the law to uphold the sanctity of contracts will best be served (i.e. a case where there are competing claims for specific performance made by successive purchasers) by giving effect to the contract prior in time and by leaving the second purchaser to pursue a claim for damages for breach of contract. In exceptional cases, however, there may be special circumstances which upset the equities favouring the first purchaser. There are no such circumstances revealed by evidence in this case – see also *Crundall Bros (Pvt) Ltd* v *Lazarus N O & Anor* 1991(2) ZLR 125 (S) at 133C-D and *Chimphonda* v *Rodrigues & Ors* 1997 (2) ZLR 63 (H). There are no *mala fides* shown on the part of 2nd and 3rd respondents. The papers show that 1st respondent's agreement of sale with

the 2nd and 3rd respondents preceded the one he signed into with the applicant. There is no allegation that 2nd and 3rd respondents had prior notice of the latter contract. 2nd and 3rd respondents' rights, therefore, take precedence over those of the applicant and they are entitled to transfer.

Accordingly, it is ordered that:

1. The provisional order issued by this court on 18 February 2004 in HC 257/04 be and is hereby discharged with the applicant paying the costs of suit.
2. The 1st respondent, within fourteen (14) days of this order being served, sign all the documents necessary to effect transfer of stand number 67005 Sizinda, Bulawayo Township to first and second respondents in HC 1863/04 [second and third in this judgment]
3. The third respondent in HC 1863/04 through its appointed official, sign al documents and papers to effect the transfer of the said property held under title deed number 1233/81 from 1st respondent to applicants in HC 1863/04 [2nd and 3rd respondents in this judgment].
4. Should the 1st respondent fail or refuse to sign the documents to effect the transfer of the said property as directed in paragraphs 2 and 3 above, then the Deputy Sheriff, Bulawayo, be and is hereby directed and authorised to sign the said documents in the 1st respondent's stead.
5. That the applicant [2nd respondent in HC 1863/04] pays costs of suit in HC 1863/04.

Calderwood, Bryce Hendrie & Partners, applicant's legal practitioners
Dube & Partners, 2nd and 3rd respondents' legal practitioners