Judgment No. HB 135/06
Case No. HC 1162/04

SHADRECK DUBE

Versus

BOPSE LAND DEVELOPERS (PVT) LTD

And

PROJECT MANAGEMENT & TURNKEY PROJECTS ZIMBABWE (PVT) LTD

And

THE CITY OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 23 NOVEMBER 2006

K Lubimbi for the applicant
M Ndlovu for 1st respondent

Judgment

NDOU J: On 20 May 2003, the applicant approached 2nd respondent who were acting as agents for 1st respondent intending to buy one of the stands that 1st respondent had put on offer. The applicant bought stand number 24067 Pumula South for $1 900 000,00 pursuant to an oral agreement. The agreement of sale was concluded at 2nd respondent's offices. 2nd respondent was represented by its housing officer, a Mr Makhalima. There was a document in 2nd respondent's offices showing the sizes of stands which were being offered for sale and their respective purchase prices. The applicant purchased the above-mentioned stand and on Mr Makhalima's advice, he deposited the full purchase price of $1 900 000,00 into the1st respondent's Trust Bank account which he had been supplied with. After making the payment the applicant took the deposit slip to 2nd respondent as proof of payment of the full

purchase price. 2nd respondent undertook to send the applicant the written agreement described above. Applicant did not receive the written agreement and he went to find from the 2nd respondent's officers but he was referred to 1st respondent's offices on 24 September 2003. At the latter offices he was attended to by a Mr S Ncube representing 1st respondent. Mr Ncube told the applicant that the purchase price was short by $100 000,00. Applicant was told to pay this extra $100 000,00 and also sign a blank document purporting to be the agreement of sale. The applicant refused to sign the document and pay the extra $100 000,00 as he had paid the agreed purchase price of $1 900 000,00 in full. On 25 September 2003 the applicant again went to 1st respondent's offices. He was given a letter demanding that he pays a further amount of $1 556 000,00 and the said letter had altered the purchase price from $1 900 000,00 to $3 456 000,00. The applicant refused to pay the new figure on the basis that the 1st respondent had unilaterally changed a term of the purchase agreement i.e. purchase price. The 1st respondent's case is that the $1 900 000,00 was a deposit. But this was disputed by the applicant and 1st respondent's own agent i.e. 2nd respondent. The agent wrote to the applicant in the following terms:

> "We as Project Management and Turnkey Projects sold you stand number 24067 on 20th of March 2003 on behalf of Bopse Land Developers which is 288m/2 and was $1 9million (one million nine hundred thousand dollars) which you paid in full.
>
> Please be advised that Project Management & Turnkey Projects is not party to the increase. Could you please approach Bopse for this settlement, as we are not aware that there would be increases on the stand prices." (emphasis added)

This dispute can be resolved by adopting a robust approach. The oral agreement was entered into between the applicant and the 1st respondent's agent.

Both have stated that the $1 900 000,00 was the agreed full purchase price. Even the 1st respondent's opposing affidavit does not dispute this categoric position that the $1 900 000,00 was the agreed full purchase price. Instead, 1st respondent sought to justify the alteration of the purchase price as follows:

> "We notified all our clients … who paid the stand price … about the price increases as a result of shortages of both diesel and cement therefore we had to resort to the black market to ensure that the project continued. The increase of the price was also as a direct …"
> 8. …
> 9. …
> 10. …
> 11. A) …
> B) The price increase was unavoidable and why would the other 180 clients accept the price increase is it because they reside in Zimbabwe ad were very much aware of the events taking place in the country." (emphasis added)

This is a valid oral agreement. Writing is not essential for its validity – *Regentstein* v *Brabo Investment (Pty) Ltd* 1959 (3) SA 176 (FC). There is no statutory requirement for the agreement of the kind concluded by the parties to be in writing. Section 7 of the Contract Penalties Act [8:04] does not apply here as this is not an instalment sale. The mutual contract, flowing from agreement of the minds of the parties, a *concursus animorum amino contrahendi,* was that the 1st respondent, through his chosen agent, was selling the stand to the applicant to for a full purchase price of $1 900 000. The applicant deposited the said full purchase price in accordance to the agreement and the contract is valid and enforceable – *Swart* v *Vosloo* 1965(1) SA 100(A); *Rose and Frank Co* v *Crompton & Bros Ltd & Ors* 1923 2 KB 261 at 263; *Jonnes* v *Anglo-African Shipping Co (1936) Ltd* 1972 (2) SA 827(A) at 834D and *Collen* v *Reitfontein Engineering Works* 1948 (1) SA 413 (A) at 435. This was the true intention of the parties at the time they entered into the

contract. Their agreement did not have a term which allowed the seller (i.e 1st respondent) to review the purchase price to cater for inflationary situations. The upward review may appear to the 1 respondent to be legitimate and reasonable but the bottom line is that it was never part of the agreement between the parties. The 1st respondent is not entitled to unilaterally change the terms and conditions of the agreement. The payment of $1 900 000,00 constitutes full performance by the applicant of his obligations under the oral agreement and in the circumstance he has a right to an order of specific performance. This is the general rule. (The exceptions to this rule do not apply to the facts of this case). As INNES JA put it in *Farmer's Co-operative* 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, as far as is possible, a performance of his undertaking in terms of the contract" – see also *Benson* v *SA Mutual Life Assurance Society* 1986(1) SA 776 A at 782H-J; *Haynes* v *King William's Town Municipality* 1951 (2) SA 371 (A); *Mohr* v *Kriek* 1953 (3) SA 600 (SR) and *Ncube* v *Mpofu and Ors* HB-69-06.

I enjoy discretion in this regard which I must exercise judicially. Looking at the circumstances of this case, I find that it will be in the interests of justice to order specific performance.

Accordingly, it is ordered that:

1. The agreement of sale entered into between the applicant and 1st respondent through the agency of 2nd respondent on 20 May 2003 is valid and enforceable.
2. The 1st respondent be and is hereby compelled to do all that is necessary to transfer stand number 24067 Pumula South to the

applicant failing which the Deputy Sheriff, Bulawayo be and is hereby empowered to do so on its behalf.

3. The 3rd respondent be and is hereby ordered to facilitate transfer of stand number 24067 Pumula South into the applicant's name.

4. The 1st respondent pays costs of this application.

Kenneth Lubimbi & Partners, applicant's legal practitioners
Lazarus & Sarif, 1st respondent's legal practitioners