

ENOCK SITHOLE

Versus

THOKOZILE KHUMALO

And

SALLY DUBE

And

CECIL MADONDO, N O OF TUDOR HOUSE CONSULTANTS

And

**THE DEPUTY MASTER OF THE HIGH COURT OF ZIMBABWE
(REF DRB 1235/02)**

And

THE REGISTRAR OF DEEDS (REF 808/95)

And

SEMIC AND SONS PROPERTIES (PVT) LTD

And

IMPACT TRUST & EXECUTORS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 18 DECEMBER 2006 AND 15 MAY 2008

Advocate S Nkiwane, for the applicant

R Moyo-Majwabu, for 1st respondent

Opposed Application

NDOU J: This is an application for confirmation of a provisional order granted by this court on 1 March 2006. Terms of the final order sought are as follows:

“Terms of final relief sought

1. That the 4th respondent be and is hereby directed to authorise the 3rd respondent to sign and execute all such documents as may be requisite to enable him to pass transfer of the property to the applicant herein.

Alternatively

That the 4th respondent be and is hereby ordered and directed, after the judgment of this honourable court in case number HC 2388/03 to instruct whoever will be appointed executor in the Estate of the Late Jeffery or Jeoffrey Khumalo, DRB 123/02 to transfer the property to the applicant herein, and that before such judgment all persons and their agents and all public officers be and are hereby restrained and interdicted from alienating the property or suffering it to be alienated from the Estate registered under DRB 1235/02 to any party other than the applicant herein.

2. That the costs of this application be borne *de bonis propriis* by such party or representative as shall be found to have acted dishonestly or dishonourably in attempting to effect a sale of the property, and such costs be on the attorney and own client scale, otherwise the costs shall be borne by the estate on the ordinary scale.”

The background facts of this matter are the following. On 4 August 2004, the Deputy Master, 4th respondent, in the exercise of his duty, accepted that the estate of the late Jeffrey Khumalo was testate and accepted the appointment of the 3rd respondent as executor in that deceased estate. In his capacity as executor the 3rd respondent sold stand number 193 Newton West Township measuring 4.295 square metres as described in the Deed of Transfer No. 808/95 registered in the name of Jeoffrey Khumalo together with subdivisional diagram S G 3693/58 [annexed to Deed of Transfer number 2509/91] to the applicant under a written agreement of sale.

Clause 8 of this agreement of sale states:

“8. Special Condition

this sale is subject to approval by the Assistant master of High Court in terms of section 120 of the Administration of Estates Act (6:01)”

It is common cause that when the 3rd respondent entered into agreement of sale with the applicant he was already a party (3rd respondent) under case number HC 2388/03 (filed on 4 November 2003) in which the 1st respondent was challenging his appointment as executor of the Estate of the Late Jeffrey Khumalo. In fact, at the time this matter was argued this court on 29 May 2006, had already determined the matter in the following manner.

“It is ordered ...

that

1. Annexure “A” to the application which was accepted by the Assistant Master as a valid Will of the late Jeffrey Khumalo be and is hereby declared to be invalid and of no legal consequence.

The Estate of the Late Jeffrey Khumalo be and is hereby declared intestate.
The Letters of Administration issued in favour of Tudor House [Consultants (Pvt) Ltd] as executors of the said estate is hereby set aside.
Barbara Lunga of Impact Trust Executors (Pvt) Ltd be and is hereby appointed executor dative of the late Jeffrey Khumalo.
Each party bears his/her own legal costs.”

From these facts it is clear that the applicant signed the agreement of sale that made that agreement conditional upon the happening of a certain event, i.e. the

approval of the Master of the High Court in terms of section 120 of the Administration of Estates Act, *supra*. Put differently, when he signed the agreement, applicant was accepting that if the 4th respondent did not approve it, then the agreement will be considered to have fallen through and notice of the parties thereto

would be bound by the agreement. *In casu*, when the 3rd respondent made an application for the approval of the sale agreement between him and the applicant the Deputy Master (4th respondent) raised an issue which was intimately pertinent to whether or not to approve the agreement. This is what the 4th respondent stated in his minute addressed to the 3rd respondent dated 24 June 2005:-

“Your letter dated 22 June 2005. Please be advised that the High Court case number 2388/03 has not been finalised and was referred for trial and the outcome may have a bearing on the winding up of the estate.”

As alluded to above, in HC 2388/03 the 1st respondent challenged the Will which had been previously accepted by the 4th respondent. The issue of the validity of the Will was crucial to the decision which 4th respondent had to make on whether to approve the proposed sale of the stand to the applicant by 3rd respondent. If the Will were to be declared invalid, then it would mean that the estate was to be re-registered as intestate and a new executor dative was to be appointed, the appointment of the 3rd respondent would fall away. In fact that is what happened in this case as evinced by the above-mentioned order declaring the Will null and void. The appointment of 3rd respondent as executor was nullified. In any event, 3rd respondent can only transfer to applicant such rights as the latter has over the property. *In casu*, 3rd respondent has no rights whatsoever and never had as his purported authority as executor should be treated as having been null and void *ab initio*. This is so because the so-called Will which brought about the appointment of 3rd respondent as executor testamentary was null and void *ab initio* according to the order to the order of this court under case number HC 2388/03, cross-reference 898/06.

Alternatively, if I am wrong in this finding, still the application should fail on account that clause 8, *supra*, makes the agreement of sale between the applicant and 3rd

respondent is inchoate. This contract was binding immediately upon its conclusion but what is suspended by the above condition in Clause 8 is the resultant obligation or its exigible content – *Odendaals Trust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O). This agreement is subject to an important reservation. A contract of sale subject to a condition precedent that has not yet been fulfilled is not a sale – *Leo v Loots* 1909 TS 366 at 370-1; *Corondimas v Badat* 1946 AD 548 at 558-9; *Wacks v Goldman* 1965 (4) SA 386 (W) at 388; *Cotton Tail Homes (Pty) Ltd v Palm Fifteen (Pty) Ltd* 1977 (1) SA 264 (W) at 269E and *The Law of Contract in South Africa*, R H Christie at 128-9. The condition precedent suspended the operation of all the obligations flowing from the contract until the approval of the Deputy i.e. a future uncertain event. In the absence of such Deputy master's approval, all the obligations flowing from the agreement of sale are cancelled as the primary obligation is the enforceability of the sale itself – *Ncube & Anor v Wiley & Anor* 1985 (2) ZLR 69 (HC) and *Malaba v Takangavada* 1991(1) ZLR 1 (HC). It is trite law that in contract with suspensive conditions a contractual obligation from a term of the contract can be enforced, but no action will lie to compel the performance of a condition – *Scott & Anor v Poupard & Anor* 1971 (2) SA 373 (AD) at 378; *Design & Planning Service v Kruger* 1974 (1) SA 689T and *Ncube & Anor v Wiley & Anor, supra* at 76-7. It is clear to me that Clause 8 under the heading Special Condition constitutes a condition precedent proper and as such the failure to fulfil that condition was fatal to the enforcement of the agreement of sale. In the circumstances, the application must fail.

Accordingly, the provisional order granted by this court on 1 March 2006 be and is hereby discharged with costs.

Mabhikwa, Hikwa & Nyathi, applicant's legal practitioners

James, Moyo-Majwabu & Nyoni, 1st respondent's legal practitioners