KIZITO MUTSURE

Versus

ICHABOD MURINGISI

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 12 FEBRUARY 2009

S S Mlaudzi for applicant
Respondent in person

Opposed Application

NDOU J: In 2004, the parties entered into an agreement of sale in terms of which the respondent purported to sell to the applicant a "proposed subdivision" of piece of land called Lancashire 388, in the District of Chivhu, represented and described in diagram S G number 1769/74. This piece of land measured 3 036 555 hectares and is registered in the name of the late Bernard Mudzviti Muringisi, the respondent's father. The respondent was duly appointed executor of the late's estate on 22 April 2002 by the Master.

In short, the respondent purported to sell the applicant only part of the piece of land, i.e. 100 hectares, for an agreed price of $27 million. In other words what was being sold was a "subdivision". There is factual dispute on whether the parties agreed to increase the subdivision to 147 hectares for $60 million. The applicant paid $28 million. The respondent demanded the balance of $32 million which the applicant failed or neglected to pay. The respondent considered this as constituting a breach of contract and purported to cancel the agreement resulting in the present application. I am required to determine three points *in limine* raised by the respondent before hearing argument on the merits. The issues are basically first, whether respondent, as executor of the estate, had the necessary authorisation to sell the property [or subdivide the land and sell part thereof]. Second, whether the piece of land was properly subdivided in terms of the law. Third, whether the sale was a nullity on account of the failure to obtain a certificate of "No present interest" from the appropriate Government authorities. It is common cause or it is beyond dispute that the sale was not authorised by the Master of the High Court. The issue really is the effect of such non-authorisation by Master on the legality of the agreement. On the second issue it is also common cause that the respondent did not obtain a subdivision permit from the local authority. Neither did he obtain approval of the subdivision by the Physical Planning authority. The issue is the legal effect of such non-authorisation. I now propose to consider these three points in turn.

Absence of Master's authority

In terms of section 120 of Administration of Estates Act [Chapter 6:01], the

approval of the Master of the High Court is required for such agreement of sale of an immovable asset of the estate. This is a condition precedent which suspended the operation of all obligations flowing from the agreement until the approval of the Master. The contract was biding immediately upon its conclusion but what it suspended by the provisions of section 120 is the resultant obligation or its exigible content – *Odendaal Trust Municipality* v *New Nigel Estate Gold Mining Co Ltd* 1948 (2) SA 656 (O) and *Sithole* v *Khumalo & Ors* HB-28-08. In the absence of such Master's approval, all the obligations flowing from the agreement are cancelled as the primary obligation is the enforceablility of the sale itself – *Ncube & Anor* v *Wiley & Anor* 1985 (2) ZLR 69 (HC) and *Scoff & Anor* v *Poupard & Anor* 1971 (2) SA 373 (AD). Absence of the Master's approval is fatal to the enforcement of the agreement of sale.

Absence of subdivision permit

It is common cause that the land in question, i.e. Lancashire 388 is described as a single piece of land in the Deed of Grant 6438/96 in the Deeds Registry (Section 7 of the Rural Land Act [Chapter 20:18]).

In the circumstances, sections 8 of the Rural Land Act, *supra*, applies in this case. Section 8 provides:

> "8. **Lease or alienation of land**
> Land may be leased or alienated to a single individual or to a single corporate body but not to two or more persons jointly, without the consent of the appropriate Minister in writing".

It is worth noting that section 8 is under Part III whose heading is: "OCCUPATION OF LAND BY PERSON OTHER THAN OWNER NOT INVOLVING SUBDIVISION". It is common cause that the land in this case was not subdivided. In the circumstances, its lease or alienation has to be with the written consent of the appropriate Minister. No such consent was obtained. This sale is prohibited by section 8 of Rural Land Act and is therefore unlawful. It was tainted with illegality. The *par delictum* rule applies. This is not a case where the *par delictum* rule should be relaxed. Alienation of land is strictly controlled to comply vitiates the contract – *Matsika* v *Jumvea Zimbabwe Ltd & Anor* HH-9-03 and *Mikesome Investments (Pvt) Ltd* v *Sikocks Investments (Pvt) Ltd* HH-107-03. On this factor alone the application

should equally fail.

In view of the above findings, I do not think it is necessary to consider the third point raised. The applicant cannot be granted specific performance arising from such an illegal agreement. The only avenue open for him is to sue for damages by action proceedings.

Accordingly, the two points *in limine* are ruled in favour of the respondent. I, therefore, dismiss the application with costs.

Samp Mlaudzi & Partners, applicant's legal practitioners