PHINEAS CHIVAZVE CHIOTA
and
SARUDZAI NHUNDU
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 11 October 2006

Opposed Matter

Mr *Madya*, for applicant
Mr *Mudambanuki*, for the 1st respondent

CHITAKUNYE J: The applicant and the first respondent entered into a written agreement of sale on the 25th of January 2006. The subject matter was described as "an immovable property known as Stand 139 Rietfontein, Rietfontein Township, Harare". The first respondent was the seller and applicant was the purchaser. The purchase price was stated as $28 Billion payable by a 100% CABS bond. On the 30th January 2006 the first respondent wrote two letters to CABS and applicant canceling the agreement of sale.

The letter to CABS read in the main:-

> "Dear Sir
> I write to inform you that I have cancelled sale of my house (known as Stand 139 Rietfontein T/ship) to Mr Phineas Chivazve Chiota. I have informed him in writing. Cancelled is agreement of sale dated 25th January 2006. Thus done at your platinum office. Attached is a copy of my letter to him."

The main body of the letter to applicant read:-

> "Dear Mr Phineas Chivazhe Chiota
> I hereby write to inform you that I have cancelled our agreement of sale of my house dated 25th January 2006. I have sent a copy of this letter to CABS. Also attached is a copy of a letter which I wrote to CABS."

The letters were both dated the 30th January 2006.

The applicant refused to accept the cancellation. He thus approached this court and obtained an interim order interdicting the first respondent from selling or in any way alienating or encumbering her rights, interests in the said property and that the second respondent be directed not to register any transfer of the property to any other party.

He now seeks the confirmation of the provisional order to the effect that the first respondent be ordered and directed to sign all such transfer documents as shall be necessary to enable the registration of title in the name of the applicant within ten (10) days of the service of this order failing which the Deputy Sheriff Harare be authorised to sign all such documents as shall be necessary on her behalf.

That the first respondent bears the costs on an attorney client scale.

The first respondent opposed the application. She contended that her cancellation of the agreement of sale dated 30th June 2006 as valid as the applicant had breached an oral condition precedent.

From the documents filed of record and submissions made, it appears common cause that negotiations for the sale of the property between the parties started in December 2005. Biata Nyamupinga, first respondent's close friend was involved in the negotiations.

The agreement in question was signed by the parties on the 25th January 2006 at CABS offices. The price of the property was increased from $26 Billion to $28 Billion on the date of signing.

It is further common cause that CABS had agreed to finance the full purchase price. The 1st respondent on the 30th January 2006 wrote the two letters already referred to canceling the agreement of sale.

As is evident from both letters she never stated the reasons for the cancellation.

The major issues for determination included:-

1. Whether the agreement of sale was subject to a condition precedent.
2. If so did applicant breach such condition precedent.

3. Whether the cancellation by first respondent was valid.

The first respondent argued that the agreement was subject to an oral condition precedent. This is inspite of clause 11 of the Agreement which states that:-

> "The parties acknowledge that this document constitutes the entire agreement between them and that no other terms, conditions, stipulations, warranties or representations whatsoever have been made by them or their agents other than those set out in this agreement and the parties agree that no variation of this agreement shall be binding on them unless first reduced to writing and signed by both parties."

This clause makes it clear that all the terms and conditions of the agreement of sale are to be found in the four corners of the written agreement of sale.

The clause is in line with the parole evidence rule. The parole evidence rule provides that when a contract has been reduced to writing the writing is in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents nor may the of such document be contradicted, altered, added to or varied by parole evidence.

See *Hoffman and Seffertt*. the South African Law of Evidence 4th Edition p 294.

In *Thrart v Kraukamp* 1967(3) SA 219 TRENGROVE J held that evidence to prove that a written contract for the sale of land was subject to a suspensive condition entered into orally was inadmissible for two reasons one of which was that such evidence was excluded by the Parole Evidence Rule, since the alleged oral agreement contradicted certain terms of the written contract.

Further it has been held that where the object of the respondent in seeking to adduce the extrinsic evidence is to incorporate the suspensive condition as a term of the Deed of sale and then to enforce such a term by

relying on the applicant's failure to comply with the alleged suspensive condition, the court will not accept such extrinsic evidence.

See *Philmatt (Pty) Ltd v Masselbank Development CC* 1996(2) SA 15 at page 23 H-I.

In *casu*, the first respondnet in fact seeks to have the written agreement altered in such a way as to contradict clause 11. In her opposing affidavit she did not state why the condition precedent was not included in the written agreement of sale. It is only in the heads of argument that her legal practitioner proffered an explanation. If the condition precedent was the prime move for her to accede to sale her property she would surely have been expected at the very least to explain why it was not included or even referred to in the written agreement of sale. Equally in her letters of cancellation she did not mention the condition precedent nor an alleged breach of any condition by the applicant.

In her opposing papers the first respondent did not say within what specific period the condition precedent was to be fulfilled save to say within a few days. If there was indeed a condition precedent it would have suspended the coming into effect of the agreement of sale till fulfillment by applicant. There would not have been need to cancel something that had not yet come into operation. The first respondent seemed aware that the agreement was in operation hence the need to cancel it. She had to address one of the letters of cancellation to the applicant's financiers because she was aware they were processing the necessary papers to effect the transaction.

First respondent's conduct clearly showed that there was no condition precedent. Even for a moment accepting her argument of a condition precedent, there is still the issue of the manner in which she purported to cancel the agreement of sale. The law required her to firstly make a demand for applicant to make good any alleged breach before she could cancel. This she did not do.

In *Muranda v Todzaniso & Ors* 1998 (2) ZLR 325 (H) court held that in the absence of a *Lex commisorium* entitling cancellation if payment is not made by a particular date the purchaser has to be placed in *mora* by reasonable notice duly given by the seller.

In *Asharia v Patel & Ors* 1991 (2) ZLR 276 (SC) it was held that where time for the performance of a contract has not been agreed on between the parties performance is due on conclusion of the contract or soon thereafter as is reasonably possible in the circumstances. But the debtor does not fall into *mora ipsofacto*. He must know he has to perform. This is known as *mora expersona* and only arises after interpellation or demand. If the time stipulated in the demand for performance is unreasonably short, the demand would be invalid.

In *casu*, the alleged oral condition precedent did not specify period of performance. If first respondent wished to cancel the agreement she first had to put applicant in *mora*. This she did not do. There were only 5 days from the date of signing to the date of cancellation and only 2 of those were working days. The period within which she could have expected applicant to have performed was thus unreasonably short.

It is apparent that faced with the stark realities of her shortcomings first respondent opted to clutch at anything she could think of. She thus alleged that she had only been made or pressed to sell her property by applicant's tantalising offer of releasing two licences to her. The prospects of securing two licences made her accept a low price for the property as well. It is however clear from papers filed of record and submissions made that this was not true.

The applicant said the negotiations for the sale started in December 2005. Biata Nyamupinga confirmed that the property had in fact been on sale as from November 2005. She had been tasked by first respondent to help secure buyers. It was in that respect that she introduced the applicant to the first respondent in December 2005 and took part in the negotiations leading to the signing of the Agreement of sale on the 25th January 2006.

The fact of the property having been on the market is also confirmed by the undenied fact that the first respondent's current legal practitioner had on the 31 December 2005 entered into an agreement of sale for the same property at a price of $27Billion. His application for a loan in that amount was only withdrawn on the 10th January 2006, some 15 days before applicant and first respondent signed the agreement of sale in question.

This fact was not denied by her current legal practitioner.

The fact of the price having been declared at $27 Billion during this same period tends to negate the first respondent's contention that a $28 Billion, 15 days later was too low a price but she only acceded to it *in lieu* of the promise of two trading licences. The two licences are apparently issued from two different ministries. First respondent could not say how she hoped applicant would issue her a licence to trade in petroleum when that was not within his ministry's ambit.

It is clear that first respondent was intent on tarnishing the image of applicant in the hope that such antics would force applicant not to persist with the case.

I am of the view that first respondent has not made out a case for the admission of extrinsic evidence to prove the existence of an oral condition precedent or even that such a condition could have been made.

I accordingly hold that there was no oral condition precedent to the agreement of sale.

Even if by some stretch of thinking it was there, the first respondent did not put applicant in mora before cancelling the agreement of sale. The purported cancellation of the agreement of sale is thus a nullity.

The applicant's application is for specific performance. The first respondent has not raised any sustainable grounds why such an order cannot be made. She has not shown that she is now incapable of performing her side of the agreement. This court finds no impediment in the fulfilment of the agreement of sale.

Accordingly it is ordered that the first respondent be and is hereby ordered and directed to sign all such transfer documents as shall be necessary to enable the registration of title in the name of the applicant within ten (10) days of the service of this order, failing which the Deputy Sheriff Harare be and is hereby authorised to sign all such documents as shall be necessary on her behalf.

The first respondent bears the costs of suit on an attorney client scale.

Messrs Wintertons, applicant's legal practitioners
Gula-Ndebele & Partners, 1st respondent's legal practitioners