

DAVID CHIGODORA
and
NELIA CHIGODORA
versus
THOMAS C. T RODRIGUES
and
THOMAS C.T. RODRIGUES (N.O)
and
THE REGISTRAR OF DEED
and
THE MASTER OF THE HIGH COURT
and
THE DEPUTY SHERIFF

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 October 2010 & 29 December 2010

Advocate *Mushore*, for applicant
N. Madya, for 1st & 2nd respondent

MTSHIYA J: This is an application wherein the applicant seeks the following relief:-

- “1. The first and second respondents sign all documents and take all necessary steps (including obtaining the Master’s Consent) to pass transfer in favour of the applicants of the property being a certain piece of Land situate in the District of Salisbury, being Lot 1 of Subdivision A of Lot 18 of Greendale held under Deed of Transfer Number 5266/84.
2. In the event of them failing to do so within seven (7) days of this Court Order, the Deputy Sheriff, Harare be and is hereby authorized to sign all documents and take all necessary steps to pass transfer of the property into the Applicants names.
3. The first respondent and second respondents be and are hereby ordered to pay the applicants’ costs of suit on the Attorney and Client scale jointly and severally.”

The brief facts surrounding the relief sought are these:-

It is common cause that on 10 February 2005 applicants entered into an agreement of sale with the first respondent in his personal capacity and as Executor of the estate of his late wife, namely Emelia Maria Bernadette Rodrigues for the purchase of Lot 1 of subdivision A of Lot 18 of Greendale, measuring 4118 square metres (the property). The property is also known as

number 8 Harris Road, Highlands, Harare. The agreed purchase price of the property was seven hundred and sixty million dollars (ZW \$760 000 000-00). On 15 February 2005 the applicants paid the full purchase price through the first respondents' conveyancers, namely Wintertons Legal Practitioners. The money paid was to be held in trust pending transfer of the property into the names of the applicants.

Clause 3(b) of the agreement of sale, signed by the parties on 10 February 2005, provided as follows:

“3(b) That this Agreement is subject to the Seller obtaining the necessary authority from the Master of the High Court to sell the one half undivided share registered in the name of Emilia Maria Bernadette Rodrigues, of which the said Thomas Rodrigues is the sole beneficiary.”

As at 10 May 2005 the Master of the High Court (the Master) had not yet been approached for granting the necessary authority to sell the one half undivided share registered in the name of Emilia Maria Bernadette Rodrigues. The first respondent's legal practitioners then wrote to the applicants in the following terms:

**“RE: SALE T C P RODRIGUES – ESTATE LATE EMILIA MARIA
BERNADETTE RODRIGUES”**

We refer to the above agreement of sale.

We have been instructed by the Executor in the Estate, to cancel the Agreement of Sale as the beneficiaries in the Estate have repudiated the sale on the basis that the Executor did not act in the best interest of the Estate.

We are accordingly left with no alternative but to formally cancel the sale and to return to you monies paid pursuant to the agreement.

Accordingly, we forward herewith our cheque drawn in the sum of \$765,613,085.00 in full and final settlement of this matter.

Please acknowledge safe receipt of the enclosed payment”

On 5 July, 2005 the applicants' legal practitioners wrote to the respondents' legal practitioners in the following terms:-

“RE: TRANSFER FROM THOMAS C P RODRIGUES & ESTATE LATE”

EMB RODRIGUES TO DAVID & NELIA CHIGODORA

We refer to the above and advise that we have been retained by Mr and Mrs Chigodora to act for them in this matter. We do understand that there has been some communication between yourselves and Messrs Dzimba Jaravaza & Associates who were representing our clients

We have been given your letter of the 10th May 2005 together with the agreement of sale. We have also perused the Master's file DR 3208/04 which shows that there has been no application for his consent to dispose of the property. We are instructed to write to you as follows:

1. The agreement that was signed between our clients and Mr Rodrigues in his Personal capacity and in his capacity as the Executor of his wife's estate states Clearly that he is the beneficial owner of the property held under Deed of Transfer Number 5266/84 which is the subject of the sale.
2. Our clients duly complied with the agreement of sale and paid the purchase Price and the transfer costs.
3. The agreement was subject to the Master's Consent in terms of Section 120 of The Administration of Estates.
4. To their surprise our clients then received a letter from yourselves dated 10th May 2005 in which you purported to cancel the agreement on the instructions of the Executor of the Estate. The reason advanced for the cancellation was that the beneficiaries had complained that the "Executor did not act in the best interests of the Estate."
5. Firstly our clients have not been informed of the identity of these Alleged beneficiaries and this averment is the total opposite of what Mr Rodrigues stated in the agreement that was prepared by ourselves. Our client would like to know who these beneficiaries are so that they can be cited in the proceedings that our clients intend to institute should this matter not be resolved amicably.
6. Secondly the property in question was the matrimonial home of the Rodrigues family hence the need to give Mr Rodrigues a period not exceeding ninety (90) days to find alternative accommodation after the date of transfer .The inheritance of a matrimonial home is governed by s 3A of the Administration of Estates Amendment Act [*Cap 6:02*]. It is clear in terms of that section that Mr Rodrigues is the only beneficiary of the matrimonial home. It can therefore not be true that there are any other beneficiaries who would object to the disposal of that house.
7. In the circumstances we are instructed to demand, which we hereby do, that as the Conveyancers you advise us that you are proceeding with the transfer of the property

in terms of the agreement of sale. May we have confirmation of this by Friday the 8th July 2005.

8. In the event that we do not receive such confirmation by end of business on Friday we will institute proceedings to compel transfer. We will also file an urgent chamber application to stop your client from transferring the property to any other person pending finalization of the application to compel transfer.
9. In the applications we will pray that the resultant costs be borne by your Client on the attorney and own client scale as it is clear that the reason advanced for the purported cancellation is not valid at law and is not *bona fide*.

We wait to hear from you as a matter of urgency.”

Subsequent to the above letter and on 17 August 2005 the respondents’ Legal Practitioners addressed the following letter to the Master:

“Dear Sir.

RE: ESTATE LATE E M B RODRIGUES

We act for Mr T Rodrigues who is the executor of the above estate, The estate is a half owner of a certain piece of land in the district of Salisbury being Lot 1 of Sub-division A of Lot 18 of Greendale. The executor entered into an agreement of sale with Mr and Mrs Chigodora a copy of which is annexed hereto in terms of which he sold the estate’s half share of the property together with his own half share. The sale was subject to your consent as is required for a sale by Private treaty in terms of s 120 of the Administration of Estates Act [*Cap 6:01*].

Our client is obliged to make application to you for your consent however, Since entering into the agreement his two daughters have objected to the sale we understand that a copy of their objection has been lodge with you by a letter dated 30th June 2005.

Our client has also been advised that at the time that he entered into the Agreement the property was worth far more that the agreed purchase prize And we have asked our client for furnish to us a valuation in this respect.

It seemes to us that the purpose of s 120 of the Administration of Estates Act which requires that the sale of assets of an estate to be done by Public auction is designed to protect both the estate and the beneficiaries in the event of an executor selling the property for less than its market value. Whilst our client is duty bound to make this application he does seek your protection.

In the circumstances our client leaves it to you as to whether or not you should grant your consent.

Please let us hear from you as soon as possible.”

On 20 September 2005 and upon being served with this application, the Master’s office issued the following report:

“A copy of the application has been served on me in terms of Rule 248 of the High Court Rules of 1971 as amended.

The estate of the late Emilia Maria Bernadette Rodrigues is registered with me under Dr 3208/04 and 1st Respondent who is also the surviving Spouse was appointed as an executor. I submit that all assets involving Deceased estates when being sold requires the Master’s consent as per s 120 of the Administration of Deceased Estates Act [*Cap* 6:01]. According to information on record it appears when first respondent sold the immovable property under dispute no such authority was granted neither was the estate represented as no executor was appointed . However, it would appear first respondent had the intention to sale (sic) the Property and I do not have any objection in regularizing the sale.

I have no further submissions to make and will abide by the court’s decision.”

On 17 November 2005, the Master’s office wrote to the respondents’ Legal Practitioners in the following terms:

“Dear Sir

ESTATE LATE: E.M.B. RODRIGUES

I have noted that an estate property was sold without my consent to sale in terms of Section 120 of the Administration of Deceased Estates Act [*Cap* 6:01]. It is also reported that the beneficiary who once sold the said property is no longer interest in the sale, as such my office is not in a position to authenticate the alleged sale.

Please be guided accordingly.”

In a supplementary report dated 12 March 2007 the Master's office confirmed the appointment of the first respondent as Executor Dative of the estate of the late Emilia Maria Bernadette Rodrigues with effect from 8 April 2005.

The above detailed background, explained in various exchanges of correspondences between the parties, explains why on 2 August 2005 the applicants approached this court for the relief indicated on the first page of this judgment. The application for the relief sought is opposed.

I believe that the crucial issue in this application is to determine whether or not the condition precedent (i.e obtaining the consent of the Master) was ever fulfilled. It is only upon a finding on that aspect of this matter that an order for specific performance may then be granted in favour of the applicants.

Whilst admitting that at the time this application was filed, the Masters' authority had not yet been obtained, the applicants argue that the position was later 'regularized' by the Masters' report of 20 September 2005. The clause relied upon in that report reads as follows:-

"However, it would appear the first respondent had the intention to sale (*sic*) the said property and I do not have any objection in regularizing the sale."

The applicants argue that once the Master had 'regularized' the sale in the manner indicated above, there was no need for the Master's report of 17 November 2005 in which the Master then stated :-

"My office is not in a position to authenticate the alleged sale"

Advocate *Mushore*, for the applicants, submitted that after the report of 20 September 2005 the Master became *fuctus officio*. Accordingly, the report reversing the regularization of the sale should never have been authored. The applicants, she argued, had fulfilled their obligations under the contract and therefore the respondents could not avoid specific performance.

In making the above submission Advocate *Mushore* cited the case of *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd 1993 (1) ZLR 21(H)* where the late ROBINSON J. said:-

"I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is: businessmen beware. If you fail to honour your contracts, then don't start crying if because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the

courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value at the time of the breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them...”

Advocate *Mushore* also urged the court to award costs on a higher scale.

I have indeed in one or two of my earlier judgments on other similar matters, but for different reasons, agreed with the above sentiments of the late ROBINSON J.

Mr *Madya* for the respondents submitted that at the time of entering the agreement of sale the parties were mindful of s 120 of the Administration of Estates Act [*Cap 6:01*] which provides as follows:

“If, after due inquiry, the Master is of the opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.”

Mr *Madya* said that it was because of the above provision in our law that the parties found it necessary to incorporate clause 3(b) in their agreement of sale.

Mr *Madya* further argued that upon failure by respondents to timeously apply for the Master’s consent, the applicants should have made an application for respondents to be compelled to seek the necessary consent, so as for the condition precedent to be fulfilled. He said that in the absence of the Master’s consent the application for specific performance was misplaced. In his view the Master’s report of 20 September 2005 was not a response to a formal application for consent as envisaged in law. That being the case, he argued, there was, until 17 November 2005, never any final decision rendering the Master *fuctus officio*. The Master only made a definitive decision on that date. He said it was only after making specific inquiry, upon application, that the Master declined to give his consent. The first report, he argued, was not pursuant to an application (*See Logan v Morris N.O and others 1992 ZLR (65) SC*).

I have already indicated that the main issue *in casu* is to determine whether or not the condition precedent was ever met. It is only upon the fulfilment of the condition precedent that the applicants can be entitled to the relief they seek. It is indeed correct to say that in introducing Clause 3(b) in their agreement of sale, the parties were fully aware of the requirements of law as

provided for in s 120 of the Act. It is also common cause that at the time this application was filed, the Masters' consent had not yet been obtained. The condition precedent had therefore not yet been fulfilled. It is further common cause that the Master's report dated 20 September 2005 was prompted by the service on him of this application in terms of r 248 of the High Court Rules 1971. It was not a formal response to a formal application by the respondents for consent. One can safely say the only application made to the Master was on 17 August 2005 – which application finally resulted in the Masters' negative response of 17 November 2005.

However, *in casu* the applicants firmly believe that the Master's response of 20 September 2005 constituted the requisite consent envisaged by law. This is so, because, in their view, the clause: "I do not have any objection in regularizing the sale" amounted to a regularization of the sale. I disagree with that interpretation. The Master merely indicated a willingness to regularize the sale. A formal process of regularization had to be followed.

In the same report, which, as I said earlier on, was a response to this application, the Master almost surrenders his responsibilities to this court by saying "I have no further submission to make and will abide by the court's decision." My view is that this court should not in any way be allowed to usurp the Master's authority which is conferred upon him/her by an Act of Parliament.

It is clear from the report of 20 September 2005 that, prior to this application being filed, the Master concedes that no formal application had ever been made and hence no consent had been granted. In the report, however, the Master then goes on to indicate willingness to regularise the sale. My understanding is that such regularization should follow a formal process. That process should entail a formal application by the respondents for the Master to use his authority to put right what had been irregularly done. In *casu* that process was never undertaken. The Master never took any formal steps to regularise the sale until he declined to give his consent on 17 November 2005. The application of 17 August 2005 was not for the Master to regularize what had transpired prior to being served with this application. (ie. the application before me). I believe that once the Master had, on 20 September 2005, revealed that his consent had never been sought and that he was, however, prepared to regularize the transaction, the applicants should have removed the matter from this court. The applicants would have then proceeded to seek to compel the respondents to apply for the regularization of the sale by the

Master. The fact that such a process was never embarked upon and that on 17 November 2005 the Master formally withheld his consent, leads me to the conclusion that the condition precedent was never fulfilled. As I have already indicated, the intention to regularize did not constitute a formal decision on the part of the master and therefore the issue of him being *fuctus officio* never arose.

A finding that the Master never decided on the issue of consent, prior to this application being filed, means that the condition precedent was never fulfilled and as such the agreement of sale remains unenforceable. That aspect of this matter distinguishes it from *Intercontinental*, supra, where the court's finding was that an enforceable contract existed. The agreement of sale could only come into operation upon the fulfillment of the condition precedent. The fact that the applicants might have met their obligations under the agreement of sale did not bring that agreement into operation. As long as the Master's consent was absent the agreement could not come into operation. This is not a case where the respondents were merely trying to pull out of an operational agreement. The agreement never became operational. (See *Runatsa v Rumari Estates (Pvt) Ltd & Ors* (S) 54/09).

The application before me is not a review nor an appeal against the Master's decision(s). The issue before me is to determine whether or not an enforceable or operational contract exists – meriting the grant of an order for specific performance in favour of the applicants. My finding is that the condition precedent was never fulfilled and accordingly the applicants cannot enforce the agreement of sale. The application therefore lacks merit.

The application is dismissed with costs.

Mawere & Sibanda, applicant's legal practitioners
Wintertons, 1st & 2nd respondents' legal practitioners