TAWANDA CHIPATO
versus
MARKO MUSA MASEKO
and
RICHARD MASEKO
and
BERN-WIN DEVELOPMENT COMPANY
(PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 18 March 2010 and 15 December 2010

J Mugogu, for the applicant
The first respondent in person

MAKONI J: On 8 May 2006 the first respondent ("Marko") being assisted by the third respondent ("Richard") through a power of attorney, approached this court on an urgent basis. He was seeking spoliatory relief against the applicant ("Tawanda"). The Provisional Order was granted by consent. The matter was not set down for confirmation or discharge.

On 1 August 2006 Tawanda filed the present application before this court seeking an order that he be declared the lawful registered owner of stand number 134 Chadcombe Township 2 ("the property), eviction of the respondents and costs of suit. Marko counter-claimed for the transfer of the property to Tawanda to be declared null and void and of no force or effect, and that the third respondent ("Bernwin") effects transfer to him of the property and costs of suit.

The background to the matter is that on 4 April 2002, Marko entered into an agreement of sale with Bernwin, whereby Marko purchased the property in issue for five million dollars ($5 000 000-00). It was a term of the agreement that Marko would pay a deposit of one million two hundred thousand dollars ($1 200 000-00) upon signature of the agreement "or such longer period not exceeding seven days as the developer may consent". The balance was to be paid in instalments of $100 000-00 per month for a period of 38 months starting on 1 April 2009.

On 8 August 2003 Bernwin left a cheque in a letter box, payable to Marko in the sum two million eight hundred thousand dollars of ($2 800 000-00). It was not accompanied by any explanation. Richard took the cheque to their legal practitioners on 22 August 2003. The

legal practitioners wrote to Bernwin asking for an explanation. Bernwin responded by letter dated 2 September 2003 advising that the agreement of sale between their client and them was duly cancelled on 4 August 2003 after this client had been given due notice on 15 July 2003. It was cancelled as the client had breached the terms of the agreement.

Sometime in 2003, Tawanda entered into an agreement of sale with Bernwin whereby he purchased the property. Sometime in 2005 he had the property transferred to him under Deed of Transfer No. 00 5415/05. He took occupation in 2006 triggering the urgent application for spoliatory relief.

As these events were unfolding and on 10 November 2003, Marko instructed his legal practitioners to write a letter notifying would be buyers that the property was not available for sale. The letter was given to Mr Mois the gardener who was in occupation of the property. He was instructed to show it to would be buyers.

At the initial hearing of this matter, it was observed that the provisional order had not been confirmed or discharged. In the final order, Marko sought that Tawanda restores possession and occupation of the property to him permanently. The parties agreed that that matter be consolidated to the present matter. The order for consolidation was granted. Tawanda did not file any opposing papers. He only filed heads of argument. I will take it that he is not opposed to the granting of the final order.

The basis for Tawanda approaching this court is that he is the registered owner of the property. He has real rights in the property. He also claims that he is an innocent purchaser.

Marko opposes the matter on the basis that the agreement of sale between him and Bernwin was not validly cancelled. Bernwin did not file any papers in the main application. It filed a notice of opposition to the counter claim whereby it averred that the agreement of sale between itself and Marko was cancelled. It gave the requisite notice and refunded Marko the amount he had paid towards the purchase price. Marko has no basis for attaching Tawanda's title.

My approach would be to first inquire into whether the agreement of sale between Marko and Bernwin was validly cancelled. If it was that would be the end of the road for Marko. If it was not, then I will have a double sale situation.

It is not in dispute that the agreement of sale between Marko and Bernwin was an instalment agreement. An instalment agreement is defined in the Contractual Penalties Act *Cap* 5:*04* as:

"a contract for the sale of land whereby payment is required to be made –

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments".

It is common cause that payment in this matter was to be made in more than 38 instalments.

Before terminating a sale by instalment, a seller is obliged to comply with the provisions of ss 1 and 2 of s 8 of the Act. Section 8 (1) of the Act provides:

"No seller under an instalment sale of land may, on account of any breach of contract by the purchaser-

(a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
(b) terminate the contract; or
(c) institute any proceedings for damages; unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be"

Subsection 2 of s 8 of the Act provides:

"Notice for the purposes of subs (1) shall-

(a) be given in writing to the purchaser; and
(b) advise the purchaser of the breach concerned; and
(c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than –
    (i) the period fixed for the purpose in the instalment sale of the land concerned;
    (ii) thirty days;

whichever is the longer period".

In *casu* the agreement provided for 14 days notice to the buyer to remedy a breach. In view of the provision s 8 (2) (c) of the Act, Bernwin was therefore obliged to give thirty days of its intention to terminate the agreement, unless the breach was remedied, as the period agreed to in the agreement is shorter than 30 days. I want to believe Marko when he says he was not given any notice to cancel the agreement. Bernwin in its papers, curiously did not attach the notice they gave to Marko to remedy the breach neither did it attach the notice to cancel the agreement. It only attached the letter from Marko's legal practitioner and their response. If those documents existed, they would have attached them as they are the basis of their opposition. Marko's position is buttressed by the fact that there were no attachments to

the cheque re-imbursing he purchase price. One would have thought that the cheque would be attached to the notice to cancel the agreement.

In view of the above the purported cancellation of the agreement of sale by Bernwin is not valid. That finding presents a double sale scenario before me. The law regarding double sales is well settled in our jurisdiction.

In *Choruma Blasting & Earth Mowing Services* (*Pvt*) *Ltd* v *Njainjai & Ors* 2000 (1) ZLR 85 (S) it was held that when dealing with the sale of the same property to two buyers, a factor that the court takes into account when deciding upon the remedy is whether the second buyer was aware of the earlier sale of the same property.

In *Grundall Bros* (*Pvt*) *Ltd* v *Lazarus NO & Anor* 1991 (2) ZLR 123 (SC) at p 131F it was stated:

> "The two extreme cases are clear enough when the second purchaser is entirely ignorant of the claims of the first purchaser, and takes transfer in good faith and for value, his real right cannot be disturbed contra when the second purchaser knowingly and with intent to defraud the first purchaser takes transfer his real right can and normally will be overturned subject to considerations of practicality".

The same point was made in *Ridler* v *Gortner* 1920 TPD 249 at 259-260 where WESSELS J had this to say:

> "There must be an element of deceit, an element of chicanery in the transaction before the court will set it aside on the ground of knowledge. It must be perfectly clear to the court that the person who alleges that he bought a clean transfer know perfectly well and did not expect that he would get a clean transfer except by his fraud. Any other view of the law would be extremely dangerous and would dig away the very foundations upon which our whole system of registration is based".

Turning to the facts in this matter, Marko avers that Tawanda must have been aware of his agreement of sale when he entered into an agreement of sale with Bernwin. In para 11 of the founding affidavit to the agent chamber application his agent who is Richard states:

> "Sometime in November 2003, I started receiving visits from people who claim to have bought the same stand. I caused my lawyers to write a letter as 'D', which I asked the gardener looking after the place to show to whom it may concern." (*sic*)

From the respondents' own facts, it appears when they instructed their lawyers to write the "to whom it may concern letter", the property had already been sold. Even assuming it had not been sold, the respondents have not established that the letter was brought to Tawanda's knowledge. They did not attach an affidavit from the gardener as to what he did with the note.

It is my view that Marko has not established a basis for me to make a finding that Tawanda purchased the property well knowing that he will not get a clean transfer and with intent to defraud Marko.

The balance of convenience, in my view, favours Tawanda. He is a holder of real rights and for value as compared to Marko's personal rights. Marko has not advised the court as to what action he took when he received the re-imbursement for the amount he had paid as purchase price from his silence on that point, one can safely assume that he did not return the cheque to Berwin. If that is so then he did not pay any value for the property.

The maxim "*vigilantibus* non *dormientibus jura subveniunt*" applies to the respondents fully. When they first become aware that there were people claiming to have bought their property they did not investigate the matter. They were re-imbursed the amount they had paid of purchase price. They did not take any action. When Tawanda wanted to take occupation, that is when they were again jolted into action. They filed an urgent chamber application for spoliatory relief. When the Provisional Order was granted, they did not set it down for confirmation. They were again jolted into action when Tawanda filed the present application. That is when they then counter claimed for the cancellation of Tawanda's title deed. The law does not help the sluggard.

In view of the above, the respondents have not established a basis to disturb the applicant's real rights.

The applicant claimed costs of a higher scale. It is my view that the facts of this matter do not warrant costs on a punitive scale. The respondents felt they had a basis to oppose the matter regarding the issue of notice. They in effect succeeded in that regard. I will therefore award costs on the ordinary scale.

In the result, I will make the following order:

1. The Provisional Order is hereby confirmed
2. It is declared that the applicant is the lawfully registered owner of Stand No. 2849 Chacombe of Stand No. 134 Chadcombe Township 2.

Consequently

It is ordered that:

1. The first respondent, second respondent and all those claiming rights to Stand No. 2849 Chadcombe of Stand No. 134 Chadcombe Township 2 through them are hereby ordered to vacate the property within 7 days of service of this order. Failing which the Deputy Sheriff be and is hereby directed to evict them.

2. First and second respondent to pay costs of suit

3. The first and second respondents' counter claim be and is hereby dismissed.

Lofty & Fraser, applicant's legal practitioners
Chihambakwe, Mutizwa & Partners, 1st & 2nd respondents' legal practitioners