CLEOGOZ INVESTMENTS (PRIVATE) LIMITED
versus
PATRICIA MARY ELIZABETH COX (HOUGAARD)
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 23 March & 26 April 2017

Opposed application – to compel transfer

T Mpofu, for the applicant
D Ochieng, for respondent

CHAREWA J: This is an application to compel transfer consequent upon an agreement of sale of "proposed subdivision B of Lot 369 Highlands Estate of Welmoed measuring approximately 2033 square metres" entered into between the applicant and the first respondent in January 2015.

The facts

It is not in dispute that the parties entered into the agreement of sale aforesaid or that the purchase price was $75 000. Nor is it disputed that at the time the agreement was entered into, a subdivision permit had not yet been granted by the local authority, or that the agreement was never cancelled.

It is further not disputed that the plaintiff made payments towards the purchase price in full.

The dispute between the parties

The parties are not agreed as to who appointed the Estate Agents in the matter. The applicant avers that Trevor Dollar Real Estate Company was the agent for the first respondent, while the first respondent avers the contrary.

Further there is a dispute as to whether the purchase price was paid to the first respondent. The applicant claims that it paid the purchase price in full to the first

respondent's agents, Trevor Dollar Real Estate Company. It attached receipts and RTGS transfer forms showing payment to Trevor Dollar trust account in the amount of $87 200.

It argues that, the estate agents, being the first respondent's agent for the sale of her property on commission, once the applicant paid the purchase price and transfer fees to them, it discharged its obligations and was entitled to transfer. The applicant based this averment on the fact that the first respondent was a personal friend of Mr Trevor Dollar, and Trevor Dollar Estate Agents advertised that the first respondent's intended to sell subdivisions of her land. In any event, if Trevor Dollar Real Estate Company was its agent, that would be tantamount to making payment to itself, which would be illogical.

On her part, the first respondent submits that she never received any payment from the estate agents. Besides, she was not the principal of Trevor Dollar Estate Agents and since she never received the purchase price from them, she is therefore not obliged to transfer the property.

The third area of dispute is whether there was a valid agreement of sale between the parties. The applicant submits that the parties concluded a conditional sale, subject to the first respondent obtaining a subdivision permit, which was a condition precedent. There was thus no contract between the parties until the permit was obtained. Once the permit was issued, it brought the contract into existence. Therefore at the time the contract came into existence it was not contrary to the provisions of the law as it did not contravene ss 39 and 40 of the Regional Town and Country Planning Act, [*Chapter 29:12*].

On her part, the first respondent submits that there was no condition precedent to the sale and it was thus illegal as it was contrary to the Regional Town and Country Planning Act aforesaid and is therefore unenforceable.

Who was the principal of Trevor Dollar Real Estate Company?

It seems to me that once I make a finding on Trevor Dollar Real Estate Company's agency, the second area of dispute will be resolved as well.

The documentary proof on its own is not very helpful. The receipts from the estate agents show the applicant as the "client". On the other hand, the estate agent charged commission against the first respondent, thus raising the presumption that she was indeed the client.

However, there exists communication between the first respondent and the estate agents showing that she received, at the very least, some advances which she did not dispute in those communications.

It seems that this communication between the first respondent and Mr Trevor Dollar points to a relationship of familiarity. It is clear from the communication that she was the one who informed Mr Trevor Dollar of her financial problems and her decision to subdivide her property and sell the subdivisions to overcome those challenges. It was as a result of her discussions with Mr Trevor Dollar that an advertisement was flighted in the press. In addition, the existence of communication between her and the estate agents showing that she requested and received some advances, which she did not dispute in those communications, points to her being the principal of the estate agent.

Going further, it is apparent that money was paid to Trevor Dollar Real Estate Company in payment of the subdivision to be held on her behalf. That is why she was able to request for advances which were given to her without the applicant being consulted at all. This coupled, with her admission to Mr Trevor Dollar to pay his commission confirms that Trevor Dollar Real Estate Company was her agent. It seems to me that the first respondent seeks to trifle with the court by alleging otherwise.

The law is clear, the applicant was obliged, in terms of the agreement of sale, to pay the money to Trevor Dollar Real Estate Company. The money was indeed paid for first respondent's benefit. By her own admission, she was liable for the commission. Ergo, Trevor Dollar Real Estate Company was her agent. [1]

By the same token, since the law provides that he who does an act through an agent does it himself, it made no sense for the applicant to pay the purchase price to itself, by paying it to its own agent. Further, flowing from the same principle of law, it was totally unnecessary to join the estate agent company to the suit.

How the estate agent dealt with the money is not the applicant's problem. The applicant discharged its legal obligation upon making payment to the estate agent. At the very least therefore, since the first respondent is the one seeking to withdraw from the contract, applicant is entitled to restitution from her. It is obvious that the first respondent was quite aware of this, given the tenor of her communication with the estate agent. In fact, I note that

[1] See *Lens Agencies (Pvt) Ltd v Knight Frank Beverly & Anor* 1997 (2) ZLR 167 (SC), See also Ami Zimbabwe (Pvt) Ltd v Casalee Holdings (Pvt) Ltd 1997 (2) ZLR 77 (SC)

she even at one point, instructed the agent to make restitution to the applicant. Failure by the agent to do so reposes the obligation to restitute squarely on her.

In the premises, it seems clear to me that the first respondent instructed her friend, Mr Trevor Dollar to sell her property on her behalf on commission. He was therefore her agent. Mr Trevor Dollar, through his company, sourced for prospective purchasers, drafted the necessary agreements and received payment of the purchase price on first respondent's behalf. He even made some advance payments to the first respondent from the purchase price received.

Whether or not the first respondent received all or any portion of the purchase price, is entirely between her and her agent. Once the applicant made payment to Trevor Dollar Estate Agents Trust account, it discharged all its obligations to the first respondent and is entitled to transfer, subject, of course, to the contract being legal. But even if it was not a legal contract, the first respondent has not pleaded the in *pari delicto* principle, and cannot claim that the loss should fall where it lies. She must therefore make restitution.

Contract proscribed by law

The first respondent is on firmer ground to avoid liability to transfer the property sold to the applicant, if she can show that the contract was contrary to s 39 of the Regional Town and Country Planning Act, [*Chapter 29:12*] and therefore void for illegality.

Section 39 of the Regional, Town and Country Planning Act reads:

> **"39 No subdivision or consolidation without permit**
> (1) Subject to subsection (2), no person shall—
> (*a*) subdivide any property; or
> (*b*) enter into any agreement—
> (i) for the change of ownership of any portion of a property; or except in accordance with a permit granted in terms of section forty."

The law with regard to contracts prohibited by statute may be summarised as follows:

> "As a general rule a contract or agreement which is expressly prohibited by statute is illegal and null and void even when, as here, no declaration of nullity has been added by the statute."[2]

[2] *York Estates Ltd v Wareham* 1949 SR 197, per Lewis ACJ

Therefore, once a court finds that an agreement or a contract it is being enjoined to endorse as valid was entered into by the parties contrary to statutory provisions that disposes of the matter. The requirement for courts to uphold statutes is such that even where the parties have not brought the issue up, the court is entitled, *mero motu*, to raise the issue of illegality.[3]

Hence, the question that the court has to address is whether, s 39 of the Regional, Town and Country Planning Act [*Chapter 29:12*] prohibits persons from entering into an agreement for the change of ownership of any portion of a property, even where the agreement is made, expressly or impliedly, conditional upon the obtaining of a permit.

This question, has, in my view, already been answered by the Supreme Court in the affirmative when it was held that:[4]

> "… s 39 forbids an agreement for the change of ownership of any portion of a property except in accordance with a permit granted under s 40 allowing for a subdivision. The agreement under consideration was clearly an agreement for the change of ownership of the subdivided portion of a stand. It was irrelevant whether the change of ownership was to take place on signing, or on an agreed date, or when a suspensive condition was fulfilled. The agreement itself was prohibited."*(my emphasis)*

Mr *Mpofu* is quite correct to raise the point that it is an established common law principle governing the law of contracts that an agreement of sale that is subject to the fulfilment of a condition is not a valid sale until that condition has been fulfilled.[5]

The import of this is that, where a suspensive condition operates in an agreement, the contract itself does not exist until the suspensive condition is fulfilled. A non-existent contract cannot therefore be deemed to be illegal: it is not there. Therefore, until the contract comes into existence, with the fulfilment of the suspensive condition, there is nothing to declare illegal.

Building on from this common law position, Mr *Mpofu* makes the ingenious argument that, *in casu*, because there was a condition to obtain a development permit before transfer could be effected, there was thus no valid agreement in existence between the parties until that condition was met. The contract only came into existence on the date the condition was fulfilled, and as at that date there was therefore no illegality.

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[3] Hativagone & Anor v CAG Farms (Pvt) Ltd & Ors [SC 152/14] (2015) ZWSC 42
[4] *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw (Pvt) Ltd* 2000 (2) ZLR 348 (S)
[5] *See Leo v Loots* 1909 TS 366 at 370-1

I am however not persuaded by this argument. It is my view that he goes astray when he implies that the agreement is then only effectively entered into as at the date the suspensive condition is fulfilled. This belies the fact that, in reality, the agreement between the parties was reached as at the date of signature. And in terms of that agreement, from the date of its signature the parties had certain obligations to fulfil within time limits prescribed therein: the first respondent had to obtain subdivision permit and thereafter effect transfer, while the applicant had to make payment as agreed.

It is therefore at the date of signature of that agreement that the mischief sought to be avoided by the legislative provisions arises: parties are prohibited from entering into any agreement at all until the legislative requirements are met. In this case, the parties ought not to have reached any agreement at all until a subdivision permit had been issued.

In my view therefore, what did not exist was an agreement to effect transfer before the subdivision permit was issued. Otherwise there was an agreement between the parties to effect transfer once the subdivision permit was issued, and it is that agreement which is proscribed by law.

The agreement between the parties was clearly intended that, once the subdivision permit was granted, then change of ownership would be effected. According to the *X-Trend-A-Home* case (*supra*), it was that agreement that was prohibited. The question of the condition that a permit should be obtained is therefore irrelevant.

In fact special condition number 1 reads as follows:

> "The Purchaser acknowledges that the process of subdivision and survey is on-going simultaneously with transfers. The Seller shall take all necessary steps to enable the Development Permit to be granted within a reasonable period from the date on which this agreement is contracted. *(my emphasis)*.

There is thence, a clear acknowledgment between the parties that, firstly, the agreement has been entered into in the absence of a subdivision permit, and secondly, such permit will only be obtained subsequent to the date of the agreement. This brings the agreement squarely within the ambit of the comment of MAVANGIRA J, as then was, when she stated:

> "The issuance of the permit after the agreement had already been entered into cannot have any legal effect on the validity of the agreement insofar as compliance with the Act in question is concerned. It is the state of affairs prevailing at the time that the parties entered into the

> agreement, *(my emphasis)* in relation to the existence or otherwise of a subdivision permit, that is relevant."[6]

The agreement therefore runs afoul of the law and is therefore illegal. It is trite that the courts do not give effect to illegal agreements.

Consequently, I do not agree that this case is distinguishable from the *X-Trend-A-Home* (*supra*) case. In fact, in that case, the Supreme Court clearly intended to clarify the position of agreements entered into contrary to the law, whether or not, they were subject to conditions precedent or suspensive conditions, and hence MCNALLY JA's finding that it is the agreement itself which is prohibited.

Therefore, by asking this court to find that a contract of sale to change ownership after a suspensive condition had been fulfilled was not contrary to s 39 it seems to me that Mr *Mpofu* is inviting this court to overrule the Supreme Court decision, by the back door. I refuse to accept such invitation.

In the premises, I cannot find favour with the application to compel transfer.

However having found that the applicant succeeded in proving that the purchase price was paid to the first respondent pursuant to the invalid agreement, and that she should therefore restitute, otherwise she would unjustly benefit, I make the following order:

1. The application to compel transfer is dismissed.
2. In the alternative, the 1st respondent shall pay to the applicant the sum of Seventy Five Thousand United States Dollars (USD75 0000) with interest at the prescribed rate from the date of payment of the last instalment to the date of full and final payment, as a restitution for the purchase price paid by the applicant.
3. That the 1st respondent shall pay costs of suit on a legal practitioner and client scale.

Mhishi Legal Practice, applicant's legal practitioners
Coghlan Welsh & Guests, 1st respondent's legal practitioners

[6] *Phillip Tsamwa v Ndoda Hondo and 2 Others* HH 53-2008