JOHN TRANOS MATUKUTIRE
versus
SHADRECK MUNATSI
and
FAITH MUNATSI
and
RATIDZAI MATUKUTIRE t/a GLOBAL VILLAGE

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 15 June 2023

Date of written judgment: 21 July 2023

Opposed application

F. Mahere, for the applicant
A. Kutadzaushe, for the first and second respondents
No appearance for the third respondent

MAFUSIRE J

[1] On 10 May 2018 the applicant sold to the first and second respondents ["***the respondents***"] a piece of land from a certain housing development project by him in Good Hope Township of Harare. The sale was in terms of a written agreement. All the usual terms were agreed upon, including the purchase price and the mode of paying it. In terms of the agreement, the deposit was to be paid to the seller as cash upon signing. The monthly instalments would also be paid in cash within the periods as specified. Another clause in the agreement stipulated that all the cash payments would be made directly to the seller. The applicant alleges he cancelled the agreement of sale. In these proceedings he seeks an order to confirm the cancellation. He also seeks an order that the respondents be "… *barred from purporting to be the owner …*" [*sic*] of the property in question. Costs of suit are sought on the higher scale.

[2] The respondents oppose the application. They allege they have paid the purchase price in full. Of the deposit, they allege they paid it to the applicant and the third respondent who were in the presence of each other. They assert the applicant received the deposit but

that he instructed them to obtain the receipt for the payment from the third respondent later. They got the receipt only on 1 June 2018. They further allege that the applicant authorised the third respondent to market the property and to receive the funds on his behalf. They argue that this created an agency-principal relationship between the third respondent and the applicant. All their instalments were paid to the third respondent.

[3] Apart from challenging the application on the merits, the respondents have also raised a preliminary objection that the matter is *lis alibi pendens*. They list a number of other court records said to be before this court regarding the same subject matter, including HC 6459/20. They further allege that the matter is incapable of resolution on the papers owing to serious disputes of fact. These disputes of fact are said to be in relation to whether or not the third respondent was the applicant's agent, whether or not the respondents did in fact pay the purchase price, and whether or not the applicant did receive it.

[4] Ms *Mahere*, for the applicant, stresses that the respondents did not perform in accordance with the exact terms of the agreement which specified that the purchase price had to be paid in cash to the applicant and not to anybody else. She argues that the respondents' alleged mode of payment was not in accordance with the agreement of sale. As such, the court cannot relate to it without re-writing the agreement for the parties altogether. In law, the courts don't do that.

[5] Ms *Mahere* also emphasises that apart from the clauses providing that the purchase price had to be paid in cash directly to the seller, another clause provided that the agreement was the whole contract between the parties and that any other representations or stipulations not included in it would be of no force or effect unless reduced to writing and signed by the parties. Yet another clause stipulated that the rights of either party would not in any way be prejudiced by an extension of time or other indulgence or concession which one party might grant to the other in respect of the performance of that party's obligations. As such, the court cannot recognise an agency contract between the applicant and the third respondent without violating the terms of the agreement of sale. That agreement was the exclusive memorial of the parties' undertaking.

[6] To cap her argument, Ms *Mahere* draws attention to the Supreme Court case of *Matukutire v Makwasha & Ors* SC 92-21 which involved the same applicant as seller, in respect of the same housing development project, although, and naturally, the purchasers were different. In that case, the same argument that the purchase price had been paid to the third respondent, who in fact had signed an affidavit alleging that, among other things, she had handed over the purchase price to the applicant, was raised, interrogated but rejected. The appellate court ruled that payment of the purchase price had not been made in *forma specifica* if it was to someone else other than the applicant herein. The court held that such a mode of payment violated the non-variation clause of the agreement and the parole evidence rule. The court reiterated that a non -variation clause entrenches not only the other clauses in the contract, but also itself against the possibility of informal variation. With regards the parole evidence rule, the court recalled that when a contract has been reduced to writing, the written document is generally regarded as the exclusive memorial of the transaction and no evidence to prove its terms may be permissible, save the document itself.

[7] In the present matter I reserved judgment to check the records the respondents alleged were pending before this court. However, it turned out that only HC 6459-20, *Shadreck Munatsi & Anor v John Tranos Matukutire & Anor*, can be said to be relevant. That matter is basically the flip side of the present proceedings. The respondents herein, are the applicants therein. They seek transfer of the same property from the applicant herein, the respondent therein. The cause of action pleaded by the respondents in that case is essentially the same as their grounds of opposition herein. However, nothing further could be gleaned from that record because not only is it in a shambolic state but also the applicant appears only to have filed a special plea in abatement which ironically, is also *lis alibi pendens*.

[8] Here now is my ruling. The respondents' preliminary objections are not cogent. They do not go to the root of the matter. At best, they are merely dilatory even if they were to succeed. But they cannot succeed. The reason for this is that the resolution of the dispute on the merits is dispositive of the entire matter, including these so-called points *in limine*. I will demonstrate how shortly. On the merits, the respondents cannot claim to have paid the purchase price strictly in accordance with the agreement of sale, or *in forma specifica*. They did not pay directly to the applicant. They paid to the third respondent. Therefore, if the

respondents did not pay in accordance with the agreement, that should be the end of the matter.

[9] But cases such as this may be said to be sitting at the confluence of two contrasting ideological underpinnings in the law of contract. The one such is individualism or formalism. The other is collectivism or realism. Individualism or formalism prescribes the traditional function of the courts as being merely to enforce that agreement or that bargain by those individuals of legal capacity. In *Barkhuizen v Napier* 2007 (5) SA 323 (CC), para 57, the South African Constitutional Court stressed that self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. In his doctoral thesis titled *The basis of contractual liability(1): Ideologies and approaches*, CHRIS JAMES PRETORIUS makes the point that since contractual obligations are essentially incurred through the voluntary choice of the parties involved, the court's role is largely facilitative in that it merely gives effect to the intentions of the parties.[1] The courts will not get involved in the debate relating to the fairness or otherwise of the parties' bargain. A contractant should receive the performance he or she bargained for.

[10] In contrast to individualism or formalism, collectivism or realism encompasses a communitarian vision that stresses communal values. Consent, the dominant element of individualism, does not bind collectivism. Proponents of realism argue that the idea that contracting is free and voluntary, and that the parties contract on an equal footing is fallacious: see LUANDA HAWTHORNE AND CHRIS-JAMES PRETORIUS, *Contract Law Casebook*, 2nd ed., Juta, at p 4. According to the proponents of collectivism or realism, to decide whether conduct is wrongful or not in contract, the court applies the general criterion of reasonableness which is determined according to the legal convictions of the community, or *boni mores*: see *Financial Mail (Pty) Ltd v Sage Holdings Ltd* 1993 (2) SA 451 (A), 462 and *Musadzikwa v Minister of Home Affairs & Anor* 2000 (1) ZLR 405 (H). In *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 825, 833, RUMPF CJ said *boni mores*, as a measure of society's convictions of what is right or wrong, just or unjust, are liable to adjustment in the light of constant shifts and changes in community attitudes.

[1] 2005 (68) THRHR 253, 255 – 256

[11] I consider that law, as a system of rules governing society, does not exist or operate in a vacuum. It is located in the superstructure. However, it takes its colour from the societal values. It is the sum total, or a reflection of the general socio-economic conditions obtaining in society, expressed in terms of rights and obligations. Courts' decisions that do not accord with the *boni mores* of society are liable to be despised. As ROBINSON J said in *Intercontinental Trading (Pvt) Lt v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H):

> "Let me add that to have found in this matter that there was no contract between the parties would have been artificial in the extreme and, I am sure, would have prompted any reasonable businessman to remark that if, before, he had thought that the law was an ass, he now knew for certain that it was, since it had shown itself to be the domain of niggling academics out of touch with reality and to have nothing to do with the cut and thrust of the business world where one is concerned, not with the legal niceties pertaining to, but with the perceived existence of a contract."

[12] *In casu*, Ms *Mahere's* argument is grounded purely in the classical view of the law of contract. Yet much may be said of the other view. Manifestly, the applicant's cause of action does not hinge on the fact that the respondents did not pay the purchase price. It hinges on the fact that the payment was not made strictly in accordance with the agreement of sale that required payments to be made directly to him in cash. The applicant denies ever receiving the purchase price at all. But the respondents have produced incontrovertible proof that they did pay, albeit via the third respondent. The applicant says he never authorised the third respondent to receive the purchase price for him. Yet the third respondent is not a distant and an unrelated third party. To begin with, she was at all material times the wife of the applicant. But more importantly, she was very much an integral player in the sale deal. On the agreement of sale, not only did she sign as the applicant's witness, but also whilst the applicant is captioned as the "seller", below her own signature is the caption: "SOLD BY MRS RATIDZAI MATUKUTIRE". Proponents of realism implore the judiciary to maintain a relation between law and morality: see HAWTHORNE and PRETORIUS.[2]

[13] However, in the light of the Supreme Court decision in *Matukutire v Makwasha & Ors* above, and the doctrine of *stare decisis*, the dispute in this matter is practically issue estoppel. The respondents are estopped from raising the grounds of defence that they have raised in this matter. The superior court has already ruled against such a defence, namely that they paid the purchase price via the third respondent. The law on issue estoppel, a species of

[2] *Op. cit.*

res judicata, is settled: see *Galante v Galante (2)* 2002 (1) ZLR 144 (H). In paraphrase, it is this: in the interest of finality in litigation as a tenet of public policy, a party is precluded from raising in subsequent proceedings an issue, whether of fact or of law, that was previously determined to finality by a competent court between the same parties or their privies: see *Willowvale Mazda Motor Industries v Sunshine Rent-a-Car* 1996 (1) ZLR 415 (S).

[14] The respondents' action against the applicant in HC 6459-20 which is alleged to be pending is based on the same cause of action as their defence herein. It is against the same opponent. It is in respect of the same property. As such, that action suffers from predictable failure. If the appellate court has already ruled that the respondents' mode of payment of the purchase price was not in accordance with the agreement of sale, this court cannot rule otherwise. The same goes for the alleged dispute of facts. Even if the respondents' version of the story is accepted and that of the applicant rejected, it does not take their case any further because payment of the purchase price in ways other than those stipulated in the agreement of sale is not payment *in forma specifica.*

[15] In the premises, other than paragraphs 2 and 3 of the draft order, the applicant, quite regrettably, is entitled to the main relief that he seeks, namely an order confirming the cancellation of the agreement of sale. However, paragraph 2 of the draft order in which the applicant seeks an order barring the respondents "… *from purporting to be the owner of* ..." the property cannot be granted. It is indeterminate in form, space and time. It is akin to asking for a decree of perpetual silence without pleading the cause for it. Ms *Mahere* concedes its impropriety. In para 3 of the draft order, the applicant seeks costs of suit on a legal practitioner and client scale. But there is no justification for such a penal order of costs. It is not as though the respondents have abused the court process in any way. Given that, among other things, they perceive to have paid the entire purchase price, and would therefore be entitled to transfer, they were objectively entitled to defend the applicant's claim. Therefore, the following orders are made:

i/ The cancellation by the applicant on 4 May 2022 of the agreement of sale between himself and the first and second respondents dated 10 May 2018 in relation to the

piece of land situate Stand 1239 Good Hope Township of Lot 16 Good Hope, Harare, is hereby confirmed.

ii/ The respondents shall pay the costs of suit jointly and severally.

21 July 2023

Mugiya & Muvhami Law Chambers, applicant's' legal practitioners.
Mangwana & Partners, first and second respondents' legal practitioners.