HH 22-03
HC 2748/2002

REPORTABLE - 1
DARRYL SMITH AND 55 OTHERS
versus
ZIMBABWE ELECTRICITY SUPPLY AUTHORITY

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 27 September, 2002 and 12 February, 2003

Opposed Application

Adv *F Girach* for the applicants
Adv *P Nherere* for the respondent

PARADZA J: This is an opposed application in which the applicants are seeking an order compelling the respondent to effect transfer of certain houses which the applicants purchased from the respondent. Most of the facts that form the basis of this claim are common cause. Isaac Mupotsa, who swore to an affidavit on behalf of the respondent, confirms and agrees with the applicants' version as to what happened leading to the purchase of the houses in issue. His affidavit deals mainly with an explanation of what he calls "a big mistake".

The facts are as follows -

The applicants were at the material time, namely around September 2000, employees of the respondent. They were occupying certain houses belonging to the respondent by virtue of being respondent's employees. The houses are located at Kariba. I am informed that the applicants are still in occupation of the houses. Sometime in the year 2000, the respondent, a statutory body, created by the Electricity Act [Chapter 13:05], embarked on a process of commercialisation and "unbuilding", whatever that means. As part of that process the respondent decided to sell some of its assets which were considered to be unimportant for its operations.

During that same year, the respondent's Board of Directors resolved to sell all the houses it owned, to its employees who were sitting tenants. The houses it decided to sell were labelled "non-designated houses". The applicants received letters of offer to purchase the houses they were living in. A copy of the letter that was sent to the applicants was filed with the founding affidavit. It is not necessary to quote the contents

of the letter. It suffices to say that the letter offered the person concerned "the right of first refusal" to purchase the property for a specified amount. It also gave a time limit of three weeks within which that offer was to be accepted.

It is not in dispute that all the applicants accepted the offer within the stipulated time. They then proceeded to enter into a formal agreement of sale, a sample copy of which was also filed with the founding affidavit.

Each agreement of sale, in its preamble, reads as follows -

"WHEREAS

A. The Seller is the registered owner of certain immovable property being certain piece of land situate in the district of Kariba called Stand…. (hereinafter referred to as the 'Property')

B. By resolution dated 18th August, 2000 the Board of the Seller resolved to dispose of the Seller's non-designated houses throughout the country by selling them to its employees;

C. In terms of Section 19 as read with paragraph 8 of the First Schedule in the Electricity Act (Chapter 13:05), the then Minister of Transport and Energy duly approved the said sale in its letter of consent dated 13th September, 2000;

D. The Seller is desirous of selling the Property to the Purchaser who wishes to purchase the same from the Seller;

NOW THEREFORE……."

I want to emphasise the point that the agreements which were signed by the parties proceeded on the basis of what the Electricity Act required in order to make such sales valid, namely the need for the seller to obtain Ministerial consent before proceeding with the sale. This aspect is not in issue. The issue, it would appear from the argument by Mr *Nherere*, for the respondent, is whether the Ministerial consent that was granted was in respect of the houses occupied by the applicants. The respondent's argument is that those houses were not "non-designated houses" and therefore they were sold without the Minister's consent, making the sale null and void. I will deal with this argument later.

Having entered into the agreements of sale, the parties thereto proceeded to fulfil their respective obligations. In particular, the applicants made payments of the full purchase prices, and the respondent accordingly engaged legal practitioners for the purposes of attending to the conveyancing of the properties. *Pro forma* invoices were sent to the applicants for payment of the conveyancing fees and stamp duty. The payments were accordingly effected. All the necessary papers were ready for lodging with the Registrar of Deeds. It was at this stage when the conveyancers asked the respondent to sign the Power of Attorney to pass transfer and the necessary declaration by the seller, that the respondent says it realized that it had made a mistake and that the houses were not supposed to be sold as they were not to be classed as "non-designated houses".

A resolution was passed by the Board of the respondent and approved by the Executive Chairman of the respondent "to withdraw the sale of Authority houses in Kariba that should have been retained for operational purposes and reimburse the attached employees accordingly". Further, it was resolved, "that the sale of non-designated houses in Kariba should be withheld until the house disposal issues for houses that should be retained by the Authority, in that location had been cleared".

What is of concern to me is that no explanation is given to the respondent of why this resolution was being passed. One can see from a document labelled "Internal Correspondence" which was annexed to the founding papers as Annexure "G", that the action taken by the Board was taken "in the interest of ZESA operations and that any inconvenience caused is sincerely regretted".

Letters were then dispatched to the affected people including the applicants, that read as follows -

> **" I refer to the cancellation of sale of operational designated houses as advised through the Station Manager in my memorandum dated the 6th September, 2001.**
>
> In line with the said cancellation, the offer to you of House No ---- is hereby cancelled ---"

A cheque refunding the amount paid as the purchase price was attached. I have taken note of the argument by the respondent to the effect that the whole exercise was a mistake. I must highlight, at this stage, that no such averment was made by the respondent in any of its correspondence. I also note that when the respondent wrote to the first applicant the letter of withdrawal of the sale, it purported to withdraw the offer for the sale of the house. I must point out that this was long after the contract had been signed and the parties had performed their obligations. What was left to do was the formality, as is required by law, of passing transfer. I will deal with this aspect in detail later.

Subsequent to the purported cancellation of the sale, the legal practitioners also wrote letters to the applicants enclosing a refund cheque in respect of the conveyancing costs and stamp duty that had been paid to them to enable transfer to be effected.

The applicants, in their wisdom, refused to accept the refund of the purchase price and the transfer costs. What happened thereafter was a legal wrangle between the legal practitioners acting for the two parties.

As stated above, the abovementioned facts are not in dispute. What is clear, however, is that the respondent sought to avoid its obligations by making the following averments. Firstly, the respondent says that they realized that "a big mistake" had been made in deciding to sell these houses to the applicants. In any case these houses, according to the respondent, were crucial for its operations and therefore, a decision to sell them was not only "a terrible mistake" but also "scandalous". The argument goes on to say that in any case, the consent granted by the Minister on 13 September 2000 related to "non-designated houses". Since the houses concerned, situated in Kariba, were not "non-designated houses" the required Ministerial consent was lacking. That made the sale null and void.

During submissions by Mr *Nherere* I also sought to find out from him whether, at the relevant time when a resolution was passed by the Board of the respondent in August 2000, it was known which houses in particular were to be regarded as designated and non-designated. He indicated that he could not answer

that question as he had no instructions to that effect. I asked that question because I was concerned with knowing whether the classification of the houses at Kariba as designated was done *ex post facto*, that is after the sale had been concluded and upon realising the folly of selling the houses, or whether the houses had already been listed as such before the sale was concluded. No effort was made on the papers before me to address that very important aspect. However, what I have decided from a reading of a copy of the resolution that was passed to rescind the sales which I have referred to above, is that not all houses at Kariba were to be regarded as designated. The respondent seemed to want to impress it upon me that indeed all the houses at Kariba, by virtue of its location, were not to be sold. I refer in particular to paragraph 6 of the opposing affidavit by Isaac Farai Mapotsa on behalf of the respondent. It reads in part as follows -

> "---It was at this stage that a terrible mistake was made, that of offering the houses at Kariba to sitting tenants---".

Paragraph 7 of that affidavit is important (see page 48 of record). It reads as follows -

> "7. The houses at Kariba are integral to the power station and should never have been offered to the applicants or anyone for that matter for the following reasons---".

The effect of the reasons given by the respondent is clearly to say that no house in Kariba belonging to the respondent was to be sold. This would not only create a housing shortage but would bring hardship to respondent itself which would be expected to have to create a new housing scheme for its staff or to house its staff in the nearby high density

suburb or accommodate them at expensive hotels. In Annexure "G", which I have referred to above, it is made quite clear that there are indeed other non-designated houses the sale of which has been put on hold pending the finalisation of this matter. I have already quoted in full, the relevant resolution. In my view therefore, the picture that has been painted by the respondent to make it appear that no house in Kariba was supposed to be sold is, to say the least, misleading to the extent of being incorrect.

As regards the absence of Ministerial consent, I am satisfied that the Minister gave a blanket consent to cover all the houses that were, in the discretion of the Board and management of the respondent, to be labelled as "non-designated". At the time the Minister gave his consent, no such classification in respect of these houses was in existence. If it was, I would have been furnished with that list in the opposing papers. To me it is clear that it was an afterthought, that came up rather late after the sale of the houses, to classify the houses at Kariba as designated. From the papers before me that is the only conclusion I can come to, especially in the absence of any information that points to a mistake having been made. Even assuming that a mistake was indeed made by the respondent in selling houses that were designated houses, as opposed to non-designated houses, I would find difficulty in finding in favour of the respondent. The issue is, can the respondent rely on a mistake of that nature in order to avoid the consequences of a contract that it entered into with the applicants?

To start with, it took an unreasonably long time for the respondent to discover an error of that magnitude. The conveyancers who were attending to the transfer of the houses were advised of the error in early June 2001. This is clear from the respondent's opposing affidavit, para 9 at page 50. Nothing happened between then and September 2001 when the respondent eventually informed the applicants. No explanation is given as to why it took so long for this mistake to be discovered and eventually to be communicated to the applicants.

The law on mistake which accompanies the formation of a contract is clear. It has been stated by textbook writers and in judgments of this jurisdiction, as well as other jurisdictions that have the same legal system.

Let me cite a very recent judgment of this court, namely a judgment of **BLACKIE J in *Zimbabwe Post & Telecommunications Workers Union* v *The Post & Telecommunications Corporation & Anor* HH-116-2001. The learned judge made reference to the judgment of KORSAH JA (as he then was) in *University of Zimbabwe* v *Gudza* 1996 (1) ZLR (S) 249. BLACKIE J quoted from the headnote of**

the latter case as follows -

> "where an offeror mistakenly makes an offer that is accepted by the offeree, the offeror will only be able to rescind the contract if (a) the offer was induced by fraudulent misrepresentation by the offeree, or (b) the mistake was a material one and the offeree knew, or ought to have known, that the offer had been made in error".

I have no doubt that there was no element of fraud neither is there any misrepresentation made by the applicants. No such averment is apparent on the papers. There is also no basis for holding that there was a material mistake which the applicants ought to have known about. I have already ruled that there was no mistake, particularly one that could be regarded as material. Even if a mistake was made, I do not believe it is the kind of mistake that the respondent can rely on to escape from the consequences of a contract that the respondent, without inducement, initiated and executed through to the end. In any case, an offerer cannot escape liability arising out of a contract by saying and proving that the offer he made was wrong, particularly if that offer has been accepted - (see *South African Railways & Harbours* v *National Bank of South Africa* 1924 AD 704 at 715).

In *Irvine & Johnson (SA)* v *Kaplan* 1940 CPD 647, WESSELS JA had this to say-

> "The law does not concern itself with the workings of the minds of parties to a contract but with the external manifestations of their minds. Even, therefore, if from a philosophical stand point the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement".

I find a lot of relevance and comfort in these words of the learned judge of appeal.

These words were quoted with approval by BLACKIE J and KORSAH JA in the cases I have referred to above.

The history of the facts of this matter clearly manifest that a meeting of the minds for a period of time extending between August 2000 to September 2001. What is very glaringly clear is that sometime between June 2001 and September 2001 the respondent had a "change of heart". It may be more appropriate to refer to it as a change of mind. The reasons for that change of mind become irrelevant if the sanctity of contracts must be respected. To all involved, and even those not involved, it is clear that the parties went through a sale of the house concerned and performed all the obligations that arose from the contract. A change of mind at that late hour by the respondent would not invite sympathy from anybody, moreso from these courts. Justice demands that those who enter into contracts are required to fulfil their obligations. Where for some reason that cannot be achieved, it then becomes relevant to talk of an award of damages.

Argument was advanced by Mr *Nherere* that the remedy of specific performance is a discretionary remedy. Whether a court will or will not grant an order for specific performance depends on the facts of the case.

While it may be correct to say so, the law is quite emphatic that that discretion will not be easily exercised in favour of an award of damages as opposed to the remedy of specific performance. There is a wealth of case authority that started with KOTZE CJ's *dicta* in *Cohen* v *Shires, McHattie & King* (1882) 1 SAR 41. It was carried further by INNES JA in the then Southern Rhodesian case of *Farmers Co-operative Society (Reg)* v *Berry* 1912 AD 343. At p 350 this is what he said -

> **"*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson* v Pullinger *(l OR p 301) 'the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt'."***

In *International Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd* 1993(1) ZLR 21 (H) ROBINSON J dealt at length with the factors that should be considered when deciding whether or not to grant an order of specific performance. After referring to *Cohen's* case*, supra*, and *Thompson's* case, *supra*, the learned judge said

that the right of a plaintiff to specific performance has been reaffirmed in a multitude of cases which he then mentioned at p 25. He then went on to refer with approval to the judgment of HEFER J in *Benson* v *SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) wherein that judge held as follows. The plaintiff has the right of election whether to hold a defendant to his contract and claim performance by him of precisely what he bound himself to do, or to claim damages for the breach. That right of choice a defendant does not enjoy. Although the Court will, as far as possible, give effect to a plaintiff's choice to claim specific performance, it has a discretion to refuse to decree specific performance and leave the plaintiff to claim and prove his *id quod interest*. That discretion must be exercised judicially. Each case must be judged in the light of its own circumstances. At p 783 C-D HEFER JA said -

> **"This does not mean that the discretion is in all respects completely unfettered. It remains, after all, a judicial discretion and from its very nature arises the requirement that it is not to be exercised capriciously, not upon a wrong principle (*Ex parte Neethling* (*supra* at 335). It is aimed at preventing an injustice - for cases do arise where justice demands that a plaintiff be denied his right to performance - and the basic principle thus is that the order which the Court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant."**

The respondent has not raised impossibility as a defence. It has merely claimed that there was a "big" mistake. For the reasons set out above, I consider that that excuse does not invalidate the contract the respondent entered into with the applicant. As ROBINSON J said in the *Nestle* case, *supra*, at p 37 D-F -

> "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."

Accordingly an order requiring specific performance will be issued.

As regards costs, I consider that the respondent has made it necessary for the applicants to approach the courts in order to enforce their rights without any good cause. Therefore, the applicants should be awarded costs on the higher scale.

It is ordered:-

1. That Respondent signs all papers necessary for the transfer of the 56 properties listed on the attached schedule to the persons appearing thereon, within ten days of the date of this order, failing which the Deputy Sheriff for Harare be and is hereby authorised to sign all necessary documentation to ensure that the transfer of the stands listed on the schedule is effected to the corresponding persons appearing thereon;

2. That the Respondent pay costs on a legal practitioner and client scale.

***Coghlan, Welsh & Guest,* applicants' legal practitioners**
***Muzangaza* & *Partners*, respondent's legal practitioners**