HH 14/17
HC 14368/12

BRIAN JINDA
and
MEJURY JINDA
versus
VIEWBIT INVESTMENTS (PVT) LTD
and
THE REGISTRAR

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 24 JULY 2013 & 12 JANUARY 2017

Opposed Application

F. Piki, for the applicants
C. Warara, for the 1st respondent

BERE J: It all started as a very simple contractual agreement entered into by the two applicants and the 1st respondent which was duly represented by its chosen agent, National Real Estate (Pvt) Ltd.

The sale agreement which had fairly comprehensive conditions of sale was duly signed by the parties at Harare on 11 October 2006. Having fully performed its part of the bargain the applicants sought to have title of the purchased property. All appeared to be on track until the 1st respondent started resisting transfer of the property demanding that applicants must first pay Value Added Tax up and above the agreed purchase price. The applicants could not have any of that and this dispute culminated in the applicants issuing out process in this court seeking the following relief:

"It is ordered that

1. The first respondent be and is hereby ordered to effect transfer of stand 22545 Ruwa Township of stand 8061 Ruwa Township, measuring 2 310 square metres to 1st and 2nd applicant's name within 10 days of service of this order.
2. If first respondent fails to comply with clause 1 of this order, the second respondent be and is hereby ordered to register transfer of stand 22545 Ruwa Township of stand 8061 Ruwa Township, measuring 2310 square metres to applicant's name. The Deputy Sheriff, Harare be and is hereby authorized to sign all transfer papers on behalf of first and second respondent to enable second respondent to register transfer.
3. Costs of suit."

The first respondent opposed the filed application alleging principally that the applicants must first pay Value Added Tax (VAT) in respect of the purchased stand before transfer.

Analysis of documentary exhibits and submissions by both counsels

It is this court's view that the dispute that has arisen between the parties calls for the scrutiny of the agreement that was entered into by the parties on 11 October 2006 as the parties dispute is firmly rooted in that agreement.

As already indicated, the terms of the agreement amongst the parties were elaborately spelt out in the agreement its self. Clauses two and three of the agreement spoke to the purchase price and the mode of payment and concluded that the last payment by the applicant was to be made on or before 31 December 2006.

The agreement concluded in its clause 13 that:

> "This document embodies the entire agreement between the seller and the purchaser and that no other stipulations, warranties or representations whatsoever have been made by any of the parties to this agreement, or their agents, other than such as are recorded and signed by the parties hereto and no variation of this agreement shall be valid unless reduced to writing and signed by the parties or their authorized representatives."

The impact of a non-variation clause in a contract can never be taken lightly. Courts universally derive comfort in enforcing such a clause because it accords well with public policy

and it brings certainty to the contractual relationship between or amongst the contracting parties[1]. R. H. Christie[2] in a lengthy discussion on the topic of non-variation clause concludes as follows;

> "A non-variation clause … entrenches not only the other clauses in the contract but also itself against the possibility of informal variation, so if it is desired to vary any clause in the contract informally or to do informally whatever it is that a restriction clause entrenched by a non-variation clause restricts the parties to doing in writing, the non-variation clause must first be varied."

In the light of the existence of the restrictive clause that characterised the contract between the parties to this case, the applicants must be taken seriously when they alleged that they acted fully in compliance with the contract. There is nowhere else in the agreement where it is alleged that the applicants ever agreed to some extra payment outside the Z$4 000 000,00 (four million dollars) which was demanded from them as the purchase price of the property. If it was intended to further burden the applicants with any additional payment the agreement should have been more explicit. What I have tried to summarise is the simplicity with which *Mr Piki* for the applicants presented to the court by way of a refined argument. I heard him very well and I fully concur with his submissions.

Mr Warara who appeared for the 1st respondent tried to shoot down *Mr Piki's* argument by attempting to find refuge in sections 23 and 8 of the Value Added Tax Act with particular emphasis on section 8 thereof. To avoid distorting *Mr Warara's* argument, I propose to refer to his heads of argument which he framed as follows:

> "4. It is trite that in terms of section 23 of the Act VAT should be levied on the purchaser at the time of supply which supply is defined in terms of section 8(2) (a) (ii) of the Act as referring to;
> (i) Where the supplier and recipient are persons.
> (ii) In the case of a supply of goods which are not to be removed, at the time when they are made available to the recipient.

1. Contract General Principles by Van Der Merwe and M.F.B. Reinecke and G.F. Lubbe, 4th edition, published by Juta, p 131

2. The Law of Contract in South Africa R.H. Christie, published by Butterworths, Durban, South Africa, 1983 @ p 440 par. 3

Resultantly, since the stand has not been availed to the applicants, they cannot claim that the time at which they were supposed to pay VAT has lapsed as confirmed by section 8 (3) (d) which provides that

> "Where goods consisting of fixed property or any real right therein are supplied under a sale, that supply shall be deemed to take place (i) where registration of transfer of goods is effected in the deeds registry on the date of such registration"[3].

The argument put forward by counsel did not impress me for a number of reasons.

In the first place, the 1st respondent as duly represented and having been privy to the actual drafting of the agreement of sale should have been aware of the statutory obligations attendant to a transaction such as this one. The applicants were justified to think as they did that the sale figure put forward as the price of the merx had taken into consideration the statutory obligations otherwise there would have been no reason to project the price of the sold property as four million dollars and crown such an agreement with non-variation clause.

Consequently the agreement should have specifically provided for additional payments within its body.

Secondly and more importantly, the timing of the demand for the additional payment of the VAT amount is quite curious. This amount, according to the uncontroverted submissions made by *Mr Piki* was demanded from the applicants almost five years after the payment of the purchase price. The purchase price was paid in December 2006 and was acknowledged by the 1st respondent. The issue of VAT was only raised by 1st respondent with the applicants in 2011.

It is quite significant to note that on 1 December 2006 the 1st respondent wrote to the applicants confirming <u>full</u> payment of the purchase price of the contract and it then followed the same letter with another one asserting that it was now ready to "pass legal title" to the purchasers.

3. Record page 46

The same seller went further to provide the names of the legal practitioners whom it had appointed as conveyancers in the transfer.

There can be no doubt that in terms of section 23 of the Value Added Tax Act, Chapter 23:12, whose date of commencement is given as 1 January 2004, the 1st respondent was obliged to register itself for Value Added Tax. This process had nothing to do with the applicants and as argued by *Mr Piki*, the applicants were justified to legitimately expect that the 1st respondent had complied with all the normal statutory obligations before it sold the property to it.

It is this court's view that the provisions of section 8 of the Act (referred to above) must never be read to ambush innocent purchasers like the applicants. Doing so would be attempting to re-write the parties' contract in complete violation of the non-variation clause which was made part of the contract to prevent the same mischief which the 1st respondent would now want to create.

By demanding VAT from the applicants, five years after the conclusion of the sale agreement had been concluded, the 1st respondent is only attempting to ask the applicants to pay for its ineptitude or lack of due diligence. This must not be allowed to happen.

In the result, the application is granted with costs.

It is ordered as follows:

1. That the first respondent be and is hereby ordered to effect transfer of stand 22545 Ruwa Township of stand 8061 Ruwa Township, measuring 2310 square metres to 1st and 2nd applicant's name within 10 days of service of this order.
2. That if first respondent fails to comply with clause 1 of this order, the second respondent be and is hereby ordered to register transfer of stand 22545 Ruwa Township of stand 8061 Ruwa Township, measuring 2310 square metres to applicant's name. The Deputy Sheriff, Harare be and is hereby authorized to sign all

transfer papers on behalf of first and second respondent to enable second respondent to register transfer.

3. That the 1st respondent pays costs of suit.

IEG Musimbe & Partners 1st and 2nd applicants' legal practitioners
*Messrs Warara & Associates*1st respondent's legal practitioners