

COLLIN NHAMO MADZIMA
versus
DORIS RUNESU MATE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 17 January 2017 & 8 February 2017

Civil Trial

S Vas, for the plaintiff
T Chiurai, for the defendant

DUBE J: The plaintiffs seek an order for-reimbursement of the purchase price paid to the defendant for a stand. The defendant sold stand 9547 Tynwald North, Township of Tynwald to the plaintiffs for \$7 000, 00 in July 2010. Transfer of the stand was not effected into the plaintiffs' names as the stand was not fully serviced. Instead, the parties signed a cession agreement wherein the defendant ceded her rights in the stand to the plaintiffs. Transfer of the stand delayed and whilst following it up in 2012, the plaintiffs discovered that the stand had prior to them buying it, been sold by the previous owner, who is the developer of the stands to another person in the year 2006. The plaintiffs could not obtain transfer of the stand into their name due to the fact that a third party had a claim to the stand. The plaintiffs subsequently cancelled the agreement of sale. They claim reimbursement of the purchase price on the basis that the defendant was enriched by the money paid to her which she must refund.

The defendant denies that she is liable to re-imburse the purchase price of the stand. Her position is that upon signing the cession agreement, the plaintiffs assumed her rights, title and interests in the stand as well as her obligations. She maintains that she has no obligation to transfer the property to the plaintiffs and that the plaintiffs' recourse lies against the registered and original owner of the stand, Wellington Karangura.

After the pre-trial conference meeting the following issues were referred to trial,

1. Whether the plaintiffs paid US\$7 000, 00 to the defendant.

2. Whether the plaintiffs are entitled to be refunded amounts paid by the defendant.
3. Whether the agreement of sale and agreement of cession are void and against whom are they enforceable.

The plaintiffs called one witness in support of their case. Collin Madzima the first plaintiff testified in the plaintiffs' case. His testimony is as follows. He is married to the second plaintiff. They entered into an agreement with the defendant for a stand. They paid \$7 000, 00 for the stand. A cession agreement was also entered into. When they signed the cession form, they were made to understand that it was for the purposes of transferring the property to him and his wife. They appreciated at the time of signing that the defendant had not yet obtained title deeds for the stands. They paid cession fees of \$350,00 through Amazon Real Estate, to the defendant. The plaintiffs discovered in the year 2012, that the same stand had previously been sold by Wellington Karangura the previous owner to a third party in the year 2006. They approached Borm Real Estate, the estate agents who facilitated the sale between Mr Karangura and the defendant. The estate agents company explained that it had double allocated the stand and it offered to allocate to the plaintiffs, another stand. The offer of the stand never materialised. They have since cancelled the contract. The defendant refuses to reimburse the monies paid.

The witness testified well and maintained his story under cross-examination. His version of the story was straightforward.

The defendant testified in her own case. She testified as follows. She bought the stand in issue from Wellington Karangura through Borm Real Estate. She decided to sell the stand because of the delays in servicing the stand. She sold the stand to the plaintiffs in 2010 for \$7000-00. The parties entered into a cession agreement. She ceded all her rights in the stand to the plaintiffs. After ceding her rights, she expected the plaintiffs to deal directly with Borm Real Estate. She was alerted by the plaintiffs in the year 2012 that Wellington Karangura had previously sold the stand to a third party in 2006. She was unaware of this fact at the time she bought the stand and when she sold it. She transferred all her rights in the stand to the plaintiffs. The plaintiffs should be claiming reimbursement of the purchase price from the original owner as she ceded her rights in the stand to them. The defendant maintained her version under cross-examination. Her version of events was not meaningfully challenged.

It is commons cause that the defendant sold the stand in issue to the plaintiffs for \$7000-00. The stand was paid for in full. The parties entered into an agreement of sale as

well as a cession agreement. Rights in the stand were ceded to the plaintiffs. A further \$350-00, being cession fees was paid to the defendant by the plaintiffs. It was subsequently discovered after the sale that the stand had been previously sold to a third party. The issue that remains for the court to resolve is the validity of the cession agreement and whether the plaintiffs are entitled to be refunded the purchase price and cession fees paid to the defendant.

The concept of cession has been defined in a number of cases. The case of *Johnson v Incorporated General Insurance Ltd* 1983 (1) SA 318 (A) is the *locus classicus* of the cases on cession agreements. In this case, the court defined a cession as,

“an act of transfer to enable the transfer of the right to claim to take place. Accomplished by means of an agreement entered into between the cedent and the cessionary and arising out of a *justa causa* from which the intention of the cedent to transfer the right to claim appears or can be inferred and from which the intention of the cessionary to become the holder of the right appears or can be inferred.”

The case was followed in the case of *FNB v Lynn* 1996 (2) SA 339 (A). A simpler definition of cession is given in *Contract, General Principles*, 4th Ed, Juta by Van der Merwe at p 386 where the authors define a cession as follows,

“a juristic act, which transfers the right from the estate of the creditor, (cedent) to that of another (cessionary), who thereby becomes a creditor in his stead.”

See also *Botha v Fick* 1995 (2) SA 339 (A).

The following requirements must be present for a valid cession.

- a) an agreement between the cedent and the cessionary to give and accept transfer.
- b) a right inhering to the cedent.
- c) all formalities of the law must be complied with.

Put simply, a cession is a method by which rights are transferred. It involves a transfer of personal rights by agreement between a cedent and a cessionary. Once a cession has taken place, the right vests in the cessionary. There are no formalities for the transfer of rights in a cession. The subject matter of the cession should be capable of being ceded by the cedent. The right sought to be ceded must fall within the estate of the cedent. A cedent may only cede existing rights. He may only cede rights that he is entitled to dispose of. The person disposing of the right must have the capacity to do so. The agreement concluded between the cedent and cessionary constitutes the *justa causa* for the cession. Once a cession has taken place, the cessionary steps into the shoes of the cedent and the thing ceded becomes part of the cessionary's estate. A cession is not a mode of transferring real rights.

What emerges from these facts is that when the parties signed the cession agreement, they mistakenly believed that the defendant had exclusive rights to the property. She was unaware of an earlier agreement of sale of the stand between the original owner and a third party. The defendant mistakenly thought that she had a right which she was capable of ceding.

The facts of this case disclose a double sale. The first purchaser has not been joined to these proceedings. The first purchaser has an interest in the stand that is subject of this dispute. Had he been joined to these proceedings, it would have been easier to resolve this dispute regard being had to his views. The court would also have had a holistic approach to the dispute. The failure to cite the first purchaser is not fatal to the dispute. The court is still entitled to determine the dispute in so far as it affects the rights and interests of the parties before it in terms of r 87(1) of rules. No injustice will be caused to the first purchaser by this approach. The court has decided to deal with the dispute as between the parties before it.

The first requirement related to the need for an agreement was fulfilled. The plaintiffs maintained that at the time they were asked to sign the cession form they understood that they were getting transfer of the stand into their names. The defendant told the plaintiffs at the time of the sale that she was selling the stand because there had been delays in servicing the stand and hence a delay in transferring the stand into her name. Their contention that they believed the stand was being transferred to them a day after the sale when they filled in cession form suggests folly on the part of the plaintiffs. The evidence led reveals that the parties entered into an agreement to cede the stand and not to transfer the stand into their names.

The next requirement is that the right sought to be transferred must inhere in the cedent. The word '*inhere*' means to exist. The requirement is that a cedent must have a right inhering or existing in him before he can cede rights in that asset. In determining whether or not a right inheres in a cedent, what one has to consider is whether the asset falls in the estate of the cedent at the time of the cession. See *NMB v Lynn*.^[supra] The asset sought to be transferred must be part of the estate of the cedent. The authors in *Contract, General Principles* state at p393 that:

“A cession that is intended to transfer immediately a right that is not (yet) an asset in the estate of the cedent is ineffective. This is so irrespective of whether the cedent mistakenly thinks that he has a right, or fraudulently purports to cede the right to some other person.”

The defendant mistakenly believed that the stand was exclusively hers, having bought it from the original owner. The defendant was mistaken as to her rights.

Wikipedia, the Free Encyclopaedia, defines a mistake under the law of contract as follows;

“In contract law, a mistake is an erroneous belief, at contracting, that certain facts are true. It can be argued as a defence, and if raised successfully can lead to the agreement in question being found void *ab initio* or voidable, or alternatively an equitable remedy may be provided by the courts”

There are mainly three classes of mistakes. A mistake is either unilateral, mutual or common. A unilateral mistake is found where one party has an incorrect perception while the other party is aware of the other part’s mistake. Mutual mistakes are found where both parties have the wrong impression of the others intention and both are unaware of the other’s mistake. In *Contract General Principles*, by Van der Merwe @ p 25, the authors describe a common mistake as being present,

“.....where both parties to an agreement labour under the some incorrect perception of a fact external to the minds of the parties. Such a mistake, of course, does not lead to dissensus: the parties are in complete agreement, although their consensus is based on an incorrect assumption or supposition.”

In *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* 1985 (2) CH, 273 the court remarked:

“That an agreement founded upon a common mistake which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation can be set aside formally if necessary or treated asset aside and as invalid without any process or proceedings to do so.”

Mistake renders a contract *void ab initio or void* depending on the nature of the mistake involved. Where a mistake relates to the subject matter of a contract and it has a bearing on the performance of an agreement, it is material and renders the agreement void. The mistake occurring in this case is not unilateral as none of the parties was aware of the correct position.

Both the defendant and plaintiffs, being the contracting parties, laboured under a common error or mistaken fact concerning the existence of the subject matter of the agreement, the stand. The parties laboured under the misapprehension that the stand belonged to the defendant having purchased it from the original owner. The understanding of the parties was that the defendant had exclusive rights to the stand and that she could dispose of such rights at the time the contract was entered into. Both were ignorant regarding the true

status of the stand. The mistake was common to both parties at the time that the agreement of sale and the cession agreement was entered into. The mistake relates to the subject matter of the agreements. It is material and goes to the root of the agreements. The stand is no longer available. The first purchaser has already started to develop the stand.

In a case where parties enter into an agreement and labour under a mistake as to a matter of fact essential to the agreement, the mistake renders the agreement void. No valid agreement of sale came into existence. The defendant had no capacity to dispose of a right in a stand which she did not hold. The fact that she held the mistaken view that she had the right to transfer rights in the stand does not excuse her. The defendant has not shown the existence of a right inhering in her which she was capable of transferring. The court was made to understand that the plaintiffs subsequently cancelled the sale agreement. The cession agreement has no leg to stand on. The availability of the stand is an important aspect of both agreements. No rights were transferred to the other person and effectively there was no cession of the stand. The defendant ceded rights in the stand to the plaintiffs when both parties laboured under a common mistake that the cedent had a right to the stand the cession is void that notwithstanding that there was consensus between the parties at the time when the agreements were entered and the minds of the parties were *ad idem* regarding the sale of the stand and the ceding of rights. The agreements are void *ab initio*. No rights flow from the agreements. The defendant cannot hold the plaintiffs to the contracts. The plaintiffs have established a right to be reimbursed monies paid to the defendant. The defendant's recourse lies with the original seller of the property from whom she bought the property.

The defendant has not shown that she had a right inhering in the stand which she had the capacity to cede the stand to the plaintiffs. The plaintiffs are not to blame for the mistake. All parties laboured under a common mistake. Both the sale and cession agreements are *void ab initio*. The defendant is s obliged to make good the loss. The plaintiffs are entitled to the monies they paid *in lieu* of the stand.

In the circumstances I order as follows,

1. The defendant is to pay to the plaintiffs: \$7000, 00 being the purchase price paid by the plaintiffs to the defendant for stand 9347 Tynwald North Township of Tynwald.
2. US\$350,00 being cession fees paid to the defendant
3. Interest on any amounts due at the prescribed rate of interest from the date of summons to date of full and final payment

4. The defendant shall pay costs of suit.

Scanlen and Holderness, plaintiffs' legal practitioners
Ziumbe and Partners, defendants' legal practitioners