

ESTER GANDAHWA
versus
JOSHUA GOPOZA
and
FANUEL KAPANJE
and
MARIMBA INDUSTRIAL PROPERTIES LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 19 March & 29 April 2021

Opposed Matter

D. C Kufaruwenga, for the applicant
1st respondent in default
F Mushoriwa, for the 2nd respondent
I.A Ahmed, for the 3rd respondent

MUZOFJA J: This is a case of a double sale of an immovable property known as stand Number 2657 Aspindale Gated Community “the property”.

Joshua Gopoza “Joshua” the culprit in this case purchased the property from Marimba Industrial Properties Limited, the third respondent which holds title in the property. On 13 November 2018 Joshua sold the property to the applicant for US\$45 000. He was paid US\$25 000 upon signature. The balance was payable over 8 months. Three days later and despite the contract he entered into with the applicant, he entered into another contract with the second respondent for the sale of the same property on 16 November 2015, this time for a whopping US\$140 000. The amount was paid upon signature on the contract. Thus, Joshua sold the same property twice within a week.

It was a condition of the agreement between Joshua and the applicant that occupation transfer of title shall be taken upon payment of the full purchase price. A similar term was in the second agreement. Since the second respondent paid the full purchase price first, he took

occupation before the applicant. Both purchasers have not taken transfer. At one point Joshua threatened to cancel the agreement of sale with the applicant. The applicant obtained an order declaring the agreement of sale between the parties valid and compelling transfer of title under HC 9584/19. When she tried to enforce the said order, the applicant discovered that the property was already occupied, albeit by the second respondent.

A season of court applications ensued between the parties until the parties eventually agreed to pursue this one application for a final determination.

The applicant seeks various relief, a declaration that her agreement of sale is valid, cancellation of the agreement of sale between the first and second respondents, that the agreement of sale between the second and third respondents be declared null and void, first, second and third respondents to give vacant possession of the property to the applicant and to take the necessary steps to transfer the property into applicant's name and in the event of non-compliance the sheriff of the High Court or his lawful deputy be authorised to sign all the necessary documents to effect transfer.

The first respondent, Joshua for obvious reasons did not file any response. The second and third respondents opposed the application. The second respondent also filed a counter application. The fourth respondent opted not to file any response.

In his counter application, the second respondent seeks transfer of title to his name from the third respondent. In the event of non-compliance, the sheriff of Zimbabwe or his lawful deputy be authorised to sign all the necessary documents to effect transfer.

A point was taken in *limine* which I directed should be raised as part of the merits of the case. I deal with issue raised first. It was submitted for the second respondent that the applicant has no cause of action that supports the relief sought. The applicant cannot compel the third respondent to transfer the property to her. There is no contractual relationship between the parties. Similarly the applicant cannot compel the second and third respondents to give vacant possession to her since there is no contractual relationship between the parties. The applicant holds personal rights as against the first respondent. Personal rights cannot be enforced against any other person except as against the person the applicant contracted with.

The applicant did not address the issue in her answering affidavit neither was it traversed in her heads of argument. A cursory oral submission was made that a contractual relationship

between applicant and the said respondents is not a pre - requisite in such an application. I was not referred to any law or authority to support this proposition.

A cause of action is the sum total of facts or legal theory that gives an individual or entity the right to seek a legal remedy. The cause of action must be fully set out in the founding affidavit.

In this case the applicant does not set out any facts that give rise or that entitle her to seek a remedy as against the third respondent. The third respondent is just mentioned as the holder of title in the property. As correctly submitted for the second respondent, the first respondent ceded his personal rights in the property to the applicant. The applicant therefore has personal rights in the property. A cession is a bilateral agreement transferring rights. It was described in *Hippo Quarries (TVL) (Pty) v Eardley* 1992 (1) SA S67A at 873 E – F as follows,

“Cession it is trite, is a particular method of transferring a right. The transfer is effected by means of agreement. The agreement consists of concurrence between the cedent’s *animus transferendi* of the right and the cessionary’s corresponding *animus acquirendi* of the right.”

It is not a method to transfer real rights see *Madzima v Mate* HH 86/17. Where a cession takes place the rights vest in the cessionary.

In *casu*, the applicant as a cessionary, acquired personal rights as against the first respondent. Having clad herself with personal rights, such rights cannot be enforced against any other person as except the first respondent. The first respondent did not acquire real rights from the third respondent. Therefore the first respondent could not pass rights greater than what he had acquired. In the result, the applicant did not acquire real rights from the first respondent that she can enforce them against the whole world.

The applicant cannot seek transfer from the third respondent, the registered owner of the property. There is no contractual obligation between the parties. It is a general principle of the law of contract that a contract is a matter between the parties thereto and no one who is not a contracting party will incur any liability or derive any benefit from the terms thereof (See generally Christie *The Law of Contract in South Africa* 5th Edition at pages 260- 261). On the application of the doctrine of privity of contract the second and third respondents are not bound by the agreement between the applicant and the first respondent. It therefore follows that, the third respondent not being party to the agreement and in the absence of ratification of the agreement cannot be compelled to give effect to the terms thereof by giving transfer of ownership of the property to the applicant. I find that the applicant has no cause of action against the third respondent *ex contractu*

similarly the applicant cannot compel the second respondent to do anything to facilitate transfer or possession. The second respondent is neither an administrative body to facilitate such or in a contractual relationship with the applicant giving rise to such obligations.

Granting an order as prayed for by the applicant, to order the third respondent to take all such necessary steps to effect transfer has its challenges. The third respondent may have certain requirements to be fulfilled before transfer which the applicant is not privy to since there is no agreement between the parties. I find the order sought in paragraphs four and five not proper in respect of the second and third respondents. Simply put the applicant has no cause of action for the transfer of the property as against the second and third respondent.

My finding on the cause of action does not dispose of the matter completely. I shall deal with the real issue that the parties placed before the court for determination. The real issue for determination is which agreement should be given effect to.

The law on double sales is now settled. The Supreme Court in *Guga v Moyo and others* 2000 (2) ZLR 458 (SC) which both parties relied on unpacked it as follows,

“The basic rule in double sales where transfer has not been passed to either party is that the first purchaser should succeed. The first in time is the stronger in law. The second purchaser is left with a claim for damages against the seller, which is usually small comfort. But the rule applies only in the absence of special circumstances affecting the balance of equities”.

See McKerron (1935) 4 SA Law Times 178, Burchell (1974) 91 SALJ 40And in *BP Southern Africa (Pty) (Ltd) v Densden Properties (Pvt) Ltd* 1964 RLR 7 (G), MACDONALD J (as he then was) said,

“In my view, the policy of the law will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim to damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Professor McKerron that save in “special circumstances” the first purchaser is to be preferred.”
“..... the broad principle as set out above was acknowledged to be our law in *Barros and Another v Chimphonda* 1999 (1) ZLR 58 (s) Similarly, in *Charuma Blasting and Earthmoving Services (Pvt) Ltd v Nyainjai and others* 2000 (1) ZLR 85 (S)

See also *Crundall Brothers (Pvt) Ltd v Lazarus NO and Another* 1991 (2) ZLR 125 (S). The onus is on the second purchaser to prove the special circumstances tilting the balance of equities in his or her favour. This is the approach in the South African courts per Van Zyl in *Gugu and Another v Zongwana and Others* (2014) 1 ALL SA 203 who expressed it as follows,

‘The accepted approach to successive sales and competing rights is that as a point of departure, the possessor of the earlier right, in this case is the appellants, is entitled to specific performance, unless the second purchaser can show that the balance of fairness is in his favour...’

The same applies in our jurisdiction *see Barros and Another v Chimphonda* (supra) where the court had this to say,

‘One further point needs to be underscored. It is the 2nd Appellant (2nd purchaser) bore the burden of establishing on a preponderance of equities in its favour ...Put differently, it was for the 2nd appellant to prove the special circumstances which rendered it inequitable to apply the maxim , ‘qui prior est tempore est jure’ in favour of respondent.

In short, the first purchaser must succeed where title has not passed to either party unless special circumstances exist in favour of the second purchaser. There is no definition of special circumstances in double sales, but courts have considered individual factors for each party and their effect on the balance of equities. The second purchaser must prove such special circumstances. It is not enough to merely allege certain factors.

In *Mwayipaida Family Trust v Madoroba and Others* SC 22/04 in a case where title had passed to the second purchaser the Supreme Court confirmed the cancellation of the deed of transfer in favour of the first purchaser. The court considered that the first purchaser had done everything possible to protect its rights but for some reasons beyond it, its rights were not secured exposing the first purchaser to the transfer. In *Guga v Moyo* (supra) the court accepted as special circumstances that the second purchaser had taken occupation, she had undertaken renovations in the sum of \$78 024.63, she bought the property in good faith and she bought the property for almost double the price of the first sale.

The second respondent highlighted the special circumstances that should tilt the balance of equities as follows: that he paid US \$140 000 as purchase price which is almost triple the amount paid by the applicant. He expended a further US\$45 000 on improvements and is now in occupation. He bought the property in good faith, there is no evidence that he was aware of the first sale. As correctly submitted, there was no proof, in the form of receipts that the second respondent used an additional US\$45 000 in improvements. I am unable to dismiss this averment because it was not disputed that the property was a shell house, obviously it required some expenditure to make it habitable. The second respondent attached photographs of builders working on the property. The applicant confirmed that, when she attempted to serve some court process, she found the second respondent’s builders working at the property. Taken cumulatively there is

evidence that some improvements were made on the property even if there are no receipts to show the amount of expenditure incurred.

The last special circumstance which is disputed is that the second respondent has entered into an agreement of sale with the third respondent, the title holder. The agreement of sale was attached. The third respondent conceded that the 'sale' was just meant to enable transfer of rights from the third respondent to the second respondent. There was no expectation of any payment to be made as the purchase price by the second respondent. It is on that basis that the applicant seeks a cancellation of the agreement of sale. It was argued for the applicant that, the parties to the agreement misrepresented that payment would be made yet no such payment was intended neither was a sale intended by the parties. The agreement is fraudulent and must be cancelled.

A valid agreement of sale exists where the parties who have the capacity to contract agree, the existence of the thing sold (*merx*) and the price. The fulfilment of the obligations has nothing to do with the validity of the contract. Where a contract is tainted by some illegality the court cannot enforce it.

In my view the agreement of sale between the parties satisfy the requirements of a valid sale. The concession made that there was no intention to exchange the money for the property in my view cannot invalidate the agreement. The fact of the matter is that the third respondent has already received the consideration for the property from the first respondent. This is a matter more of inept legal advice to both parties as opposed to any fraudulent intention. A tripartite agreement would have been the proper agreement in this matter. Some peripheral issue was raised on the dates of the agreement which I believe have no effect on the agreement. Even if my finding on the agreement of sale maybe incorrect I am fortified in the fact that the second respondent has engaged the title holder who is not opposed to the transfer of title to the second respondent. The application can be granted in the face of non-opposition by the party against whom relief is sought.

It was also submitted that the second respondent had already initiated the process to take transfer. No proof was attached to confirm such processes.

The applicant highlighted her circumstances that she could not take occupation as the first respondent blocked her, she is a poor widow, she used part of her late husband's pension to pay the deposit and she is unable to raise money to purchase another property. On the other hand, the second respondent seems capable of raising money to buy another property.

In my view when it comes to resources both parties are in the same predicament, they have both purchased a property for a considerable amount and have expectations to be met.

A value judgment with mathematical precision is difficult to come up with because both parties have suffered substantial prejudice. However, the court must come up with a decision. In this case the second respondent is a *bona fide* purchaser. Taken cumulatively the second respondent's circumstances present special circumstances tilting the balance of equities heavily in his favour. Although the amount paid *per se* is not a special circumstance, however if taken in conjunction with the fact that the second respondent is in occupation, has effected some improvements and has engaged the owner. I find no difference between his circumstances and that before the court in *Guga v Moyo* (supra). The court appreciates the difficulties that beset the applicant throughout the process, but her position can only be remedied by way of damages as against the first respondent. The applicant's claim should therefore fail in its totality.

The Counter Claim

The parties shall be referred to as in the main claim for consistency. In his counter claim, the second respondent seeks transfer of title from the third respondent. No relief is sought as against the applicant except for costs on a higher scale. The third respondent has not opposed the counter claim. I take it the third respondent has no objection to the transfer.

The applicant (the respondent in the counter application) has opposed the application. The matter is simply the other side of the coin in the main application. Both parties rely on the same averments as set out in the main application. It is therefore of no benefit to revisit the issues. My decision in the main matter invariably has a bearing on the counter claim. Since the second applicant has established the special circumstances that tilt the balance of equities, he is entitled to the claim for specific performance.

The second respondent looks to the applicant for costs on an attorney client scale for the unnecessary litigation. I do not agree with the basis for the claim of costs. The applicant was the first purchaser in this case and was standing on firm ground save for the special circumstances proved by the second respondent. Costs usually follow the cause but are in the discretion of the court. In this case I find it equitable for each party to bear its own costs.

Accordingly, the following order is made.

1. The main application is dismissed in its totality.

2. The counter application is granted.
3. The 3rd respondent is hereby ordered to take such steps and do all things as may be necessary to effect transfer of Stand No 2657 Aspindale Gated Community, Harare measuring 200 square meters in extent into the 1st respondent's name within 7 days of this order.
4. In the event that the 3rd respondent does not do so within 7 days of service of this order upon it, the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to sign all documents and do all such things as are necessary to ensure that the transfer referred to in paragraph 1 of this order is effected.
5. Each party to bear its own costs.

Dzimba, Jaravaza and Associates, Applicants' Legal Practitioners.
Nyawo, Ruzive Legal Practice, 1st Respondent's Legal Practitioners.
Mushoriwa Pasi Corporate Attorneys, 2nd Respondent's Legal Practitioners.
Ahmed & Ziyambi, 3rd Respondent's Legal Practitioners.