MCLEAN NGONIDZASHE KUCHOCHA
and
CECILIA KUCHOCHA
versus
PATRICIA MARY ELIZABETH COX (HOUGAARD)
and
REGISTRAR OF DEEDS N.O.

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 31 January & 8 March 2017

OPPOSED MATTER

T Mpofu and *N Chamisa*, for applicants
D Ochieng, for the 1st respondent

TAGU J: This is an application for specific performance, that is, to compel the respondents to pursue subdivision of proposed subdivision A of Lot 369 Highlands Estates of Welmoed within 5 days of receipt of this order failing which the Sheriff of Zimbabwe be and is hereby authorised to sign and submit all documentation required to facilitate and complete the process of subdivision. That the respondents shall within 7 days of the granting of subdivision referred to in (1), transfer to applicants, title of subdivision A of Lot 369 Highlands Estate of Welmoed. That in the event of the first respondent refusing or failing to, the Sheriff of Zimbabwe be and is hereby authorised to sign and submit any and all documentation necessary to facilitate and complete the process of transfer of the property in paragraph (3) above. Lastly, the first respondent shall pay costs of suit on a legal practitioner and client scale. Alternatively, that the first respondent pays to the applicants the sum of Seventy Thousand United States Dollars (US$ 70 000.00) with interest at the prescribed rate from the date of payment of the last instalment to the date of full and final payment, as restitution for the purchase price paid by the applicants.

The facts are that on the 5th of January 2015, at Harare, Zimbabwe, the applicants and the first respondent entered into a written agreement of sale in respect of certain immovable

property called proposed subdivision A of Lot 369 Highlands Estate of Welmoed measuring approximately 2015 metres. The terms of the agreement of sale where inter –alia that the purchase price for the said property shall be $70 000.00 (Seventy Thousand United States Dollars). This was payable by way of a deposit of $30 000.00 into the seller's duly appointed agent's account namely Trevor Dollar Trust Account on the date of signature by the purchasers. The balance of $40 000.00 was to be paid in four equal instalments of $10 000.00 on the 1st November 2014, 1st December 2014, 1st January 2015 and 1st February 2015. The parties acknowledged that the process of subdivision and survey was on-going and to that end, transfer shall be effected upon fulfilment of this special condition. It was the obligation of the seller to take all necessary steps to enable the Development Permit to be granted within a reasonable time. That the seller shall give vacant possession of the property hereby sold to the purchasers on the date of registration of transfer into the purchasers' name. The conveyancers were Mahuni and Matutu of 182 Samora Machel, Corner 8th Avenue, Harare. Finally, the seller was to take all necessary steps to enable transfer of the property to be effected within a reasonable period of the date on which this agreement was contracted.

In compliance with the agreement the applicants paid the full purchase price in terms of the agreement as per copies of bank statements and receipts attached as Annexures B1-B4. In breach of the agreement the respondent has to date failed, refused and/or neglected to transfer the said property within a reasonable time as contemplated by the agreement of sale despite that on the 5th August 2015 the Department of Works at the Harare City Council granted a permit authorising such subdivision. After constant reminders the first respondent's legal practitioners wrote a letter to the applicants indicating that the first respondent now wanted to resign herself from her obligations under the agreement of sale. This prompted the applicants to file this application.

The first respondent opposed the application. The basis of the opposition is that the agreement entered by the parties on the 5th January 2015 was for the change of ownership of a certain portion of her property and was entered into before the issuance of a subdivision permit hence such an agreement was prohibited in terms of s 39 of the Regional Town and Country Planning Act [*Chapter 29:12*]. She said since the agreement was illegal the relief sought by the applicants in the main is incapable of being granted. As to the alternative relief sought she argued that there is a non-joinder of Trevor Dollar who received the applicants' money. She claimed that she cannot be ordered to pay restitution because she did not receive

any of the funds relating to the said purchase price hence she was not enriched in any way as a result of the illegal sale.

The counsels for the applicants submitted that this was a conditional sale. They said the contract became valid and binding at the time the special condition was fulfilled. On the alternative they urged the court to order restitution on the basis that the first respondent was unjustly enriched. The counsel for the respondent disputed that what the parties entered into was a conditional sale. He said what are referred to as special conditions are in fact not conditions but terms of the agreement. They disputed that Trevor Dollar was the agent of the first respondent but that of the applicants and averred that the first respondent was not unjustly enriched hence is not liable to pay restitution. They referred the court to a number of cases notably *X-Trend-A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) Ltd* 2000 (2) ZLR 348 (SC) and *Hativagone & Anor* v *CAG Farms (Private) Limited & Anor* SC -42-15 which all dealt with s 39 of the Regional Town and Country Planning Act.

Having read the agreement in question I do not agree with the counsel for the first respondent's contention that this was not a conditional sale.

Clause 3 of the agreement clearly spelt out the special conditions on which this sale agreement was made. It did not talk of terms but special conditions. The clause is worded as follows-

> "**3 THIS SALE** is subject in all respects to the following special conditions and to the general conditions over leaf…
>
> **SPECIAL CONDITIONS**
>
> 1. The Purchaser acknowledges that the process of subdivision and survey is on-going simultaneously with transfers. The Seller shall take all necessary steps to enable the Development Permit to be granted within a reasonable period from the date on which this Agreement is contracted.
> 2. ….
> 3. ….
> 4. ….
> 5. ….
> 6. …."

It was therefore one of the special conditions of sale that the Seller was supposed to obtain a Development Permit from the City of Harare. In her opposing affidavit the first respondent fulfilled the first special condition when she said in para 6.9 that-

> "Shortly after signing the agreement, I realised that I may have acted too hastily in entering the agreements and spoke to Duncan on various occasions asking if I could withdraw from the agreement. Duncan advised me that I could not as the agreement was valid and binding and that I had no choice but to go through the process of subdividing the property if I did not want to be sued for breach of contract. Consequently, as I feared the prospects of being sued and as I believed Duncan's advice that the agreement was valid,

> I proceeded to apply for the subdivision permit, which permit was granted on the 5th of August 2015."

She went on to say after obtaining the subdivision permit she had problems with Duncan when she realised she was to lose dual access to the property and ownership of a borehole contrary to the understanding she had with him. All this makes me believe that the first respondent was dealing with Duncan as her agent.

Having found that this was a conditional sale of an undivided piece of land where a Development Permit had not yet been granted by the City of Harare but was granted later, the issue to be decided is the legality of that agreement sale. The court was referred to the case of *X-Trend -A-Home (Pvt) Ltd* v *Hoselaw Investments (Pvt) ltd supra*. This case explored a number of situations of this nature by referring to a number of decided cases.

Before dealing with the decision of this case it is necessary to quote the provision of s 39 of the Regional Town and Country Planning Act which forbids an agreement for the change of ownership of any portion of a property excerpt in accordance with a permit granted under s 40 allowing for a subdivision. The section reads as follows:

> "39. No subdivision or consolidation without permit
> (1) …no person shall-
> (a) subdivide any property, or
> (b) enter into any agreement-
> (i) for the change of ownership of any portion of a property , or
> (ii) …
> (iii) …
> or,
> (c) …
> except in accordance with a permit granted in terms of section forty."

In *X-Trend-A-Home* case *supra* the judge in deciding the case looked at the decision that had been made in the case of *Moser* v *Milton* 1945 AD 517 where an almost similar condition existed where the approval of the Minister was required first. The Minister in that case gave his approval a day after Moser had resiled from the agreement. Milton argued that Moser had no right to resile. However, Milton lost the argument inasmuch as the parties were not bound unless the contract had been approved by the Minister, the buyer was entitled to resile from the contract before such approval was given. Again in York Estates Ltd v Wareham 1949 SR 197, the other party sought to enforce the contract after the Ministerial approval was granted. The contract had been entered before the Ministerial approval was made. It was held that the agreement was null and void although a condition precedent had been fulfilled. In the case of NCR *Zimbabwe (Private) Ltd* v *Gulliver Consol Ltd & Anor*

1993 (1) ZLR 205 a condition precedent was later fulfilled and the court held that the contract was valid and enforceable. However, that decision was later overturned. In the *X-Trend – A-Home* case *supra* the judge of the High Court had ruled that the contract was not valid where the other party resiled before fulfilment of a condition precedent. On appeal that decision was upheld. In arriving at that decision the learned judge said-

"Whether the change of ownership is to take place on signing, or later on an agreed date, or when a suspensive condition is fulfilled, is unimportant. It is the agreement itself which is prohibited.

The evil which the statute is designed to prevent is clear. Development planning is the function and duty of planning authorities, and it is undesirable that such authorities should have their hands forced by developers who say "but I have already entered into conditional agreements, major developments have taken place; large sums of money have been spent. You can't possibly now refuse to confirm my unofficial subdivision or development."

In casu the agreement was concluded when the suspensive condition had not been fulfilled. This means that the agreement was null and void for falling foul of s 39.The suspensive condition was them fulfilled before the first respondent resiled from the agreement. I was asked to make a pronouncement that the contract became valid and binding upon the fulfilment of the suspensive condition. In my view the fulfilment of the suspensive condition is neither here nor there. The agreement it -self was prohibited, null and void.

For these reasons an application for an order for specific performance is dismissed.

This brings me to the alternative relief. The first respondent submitted that there was non- joinder of Trevor Dollar who received the money from applicants for onward transmission to the first respondent. She claimed she did not receive the funds.

In her opposing affidavit the first respondent said that she knew the director of Trevor Dollar, one Duncan Dollar for many years as both a friend and also a fellow member of Narcotics Anonymous. Duncan Dollar as her friend was aware that she had in her name a large property that she resided on. Sometime in January 2015 when she was suffering from a relapse with the addiction Duncan Dollar approached her after a Narcotics Anonymous session and advised her that he had two clients interested in her property if she was interested in subdividing. She then agreed to the request without seeking guidance from her family and peers. She then made two requests which she asked Duncan Dollar to honour. Firstly she requested to have dual access to the remaining property and secondly, to remain with the borehole. That is how the agreement was finally entered into. In my view and on these facts it

is not true that Duncan Dollar was the applicant's agent but the first respondent's agent. Even if it is accepted that Duncan Dollar was applicants' agent I do not think at law his non-joinder is fatal to the proceedings.

In a restitutionary claim of this nature an estate agent cannot be joined to proceedings by the party seeking restitution. This was the decision of this court in *Musemwa & Ors* v *Estate Late Misheck Tapomwa & Ors* HH-136-16. The court said-

> "The subject regarding the liability of an agent to a third party in a contract is trite. The position was dealt with in *Lens Agencies (Pvt) Ltd* v *Knight Frank Beverly and Anor* 1997 (2) ZLR 167 (SC) where the court remarked as follows:
>
> > "In my view, however, the privity of contract is clearly between the landlord and tenant. The estate agent holds the deposit on behalf of his principle, the landlord, and is accountable to him alone. It is the landlord who is accountable to the tenant. The landlord does not claim interest on the deposit from the estate agent. Nor do I think it has been shown that he has a duty to do so, and then to account to the tenant if that were the position the whole structure of the tripartite relationship would be affected."

Ami Zimbabwe (Pvt) Ltd v *Casalee Holdings (Pvt) Ltd* 1997 (2) ZLR 77 (SC) is authority for the proposition that he who does an act through an agent does it himself. See also *Marketo and Anor* v *Wood and Ors* 1994 (1) ZLR 102 (HC). In *Nordis Construction (Pvt) Ltd* v *Theron, Burke and Isaac* 1972 (2) SA 535 (D) at 540 where the court held that "an agent can only be accountable in his personal capacity where he has purported to represent a non-existent principle or where has pledged responsibility for his actions."

Therefore non-joinder of an agent is not fatal to the applicants' application. The sole issue to be decided is the liability of the first respondent whether she received the payments or not. If she did so then she is liable to restitute the application on the basis of unjust enrichment.

If regard is had to the e-mail dated Monday, February 8, 2016 at 12.39 PM from Duncan Dollar to the first respondent it is clear that some money was advanced to the first respondent when he said-

> "Before I pass this on to the Purchasers, please note that in addition to the money that has already been advanced to you, there are additional costs which you will be liable for in the event the Purchasers agree to withdrew;….."

The first respondent is therefore being dishonesty to say she did not receive any funds from the purchasers. She did in fact received the purchase price and now that she has resiled from the agreement she must restitute all the money she received because she entered into

this illegal agreement knowingly and got unjustly enriched to the tune of USD$ 70 000.00. The applicants have managed to prove the alternative claim.

In the result it is ordered that

1. The main claim is dismissed.
2. In the alternative, the 1st respondent shall pay to the applicants the sum of Seventy Thousand United States Dollars (US$ 70 000.000) with interest at the prescribed rate from the date of payment of the last instalment to the date of full and final payment, as restitution for the purchase price paid by the applicants.
3. That the 1st respondent shall pay costs of suit on a legal practitioner and client scale.

Mhishi Legal Practice, applicants' legal practitioners
Coghlan, Welsh and Guest, 1st respondent's legal practitioners