RACHEL T DUBE
versus
RHODA MUCHETWA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 13 and 25 February 2009.

OPPOSED APPLICATION

Mr D Mwonzora for applicant
Mr L T Musekiwa for 1st respondent.

MAKARAU JP: The applicant and the respondent concluded an agreement of sale in respect of certain property in Chegutu on 25 October 2006. The agreement was reduced to writing. In terms of the agreement of sale, the purchase price was set at $29 million. The full purchase price was paid in full by the due date.

It is common cause that on the same day, the respondent entered into a written agreement with one Everisto Marenga, (" Marenga"), for the sale and purchase of a certain property in Glen View, Harare for the sum of $23 Million. The agreement was also reduced to writing.

It is pertinent in my view at this stage to record that the two agreements of sale were all prepared by the same law firm that appeared to be acting as the agents of both sellers in both contracts.

On 26 October 2006, before the applicant had paid the full purchase price for the Chegutu property, she was advised by the law firm handling the sale that Marenga, the seller of the property to the first respondent required to have the purchase price under his agreement "topped" up by a further $3 million. She agreed to pay the required amount as she had been told that this would enable her to move into the Chegutu property. She executed an acknowledgment of debt in favour of Marenga, promising to make the payment by 6 November 2006. She did not make the payment until four days later.

When she requested to take occupation of the property, she was advised that the agreement of sale between the parties had been cancelled because the applicant had failed to pay the money secured under the acknowledgement of debt on due date, leading to the cancellation of the agreement between the respondent and Marenga.

Unhappy with the stance that the first respondent had adopted in the matter, the applicant filed this application, seeking an order compelling the respondent to transfer ownership of the property to her. In her application, the applicant averred that she was not a party to the agreement between the respondent and Marenga and that any cancellation of that contract did not have any consequences on her contract with the first respondent. She also prayed for an order evicting the first respondent from the property.

The application was opposed by the first respondent. In her opposing affidavit, the first respondent took the point *in limine* that the application was fraught with conflict of facts that cannot be resolved on paper and that it should be dismissed on that basis alone. Regarding the merits of the matter, the first respondent averred that it was understood between her and the applicant that the sale of the Chegutu property would only be on condition that the first respondent was able to purchase a property in Harare. She heard about the property being offered by Marenga and informed the applicant about it. At the time, the applicant could not raise the required amount. By the time that the applicant had raised the asking price, Marenga had upped his price by $3million. She communicated this increase to the applicant. In turn, the parties agreed to renegotiate the purchase price for the Chegutu property. This was set at a price that would cover the increase by Marenga. She agreed to sign the agreement of sale with the applicant. At the time of signing the agreement, she did not know that the applicant had agreed to pay an additional $3million to Marenga. Applicant failed to pay the $3million to Marenga on the agreed date resulting in Marenga canceling the agreement of sale in respect of the Harare property.

The first respondent also filed a supporting affidavit by one Mangwiro, a legal practitioner who was intimately involved in the negotiations and the drafting of the agreements between the parties. In his affidavit, Mangwiro averred that the applicant knew that the first respondent was only disposing of her Chegutu property on condition she acquired a property in Harare. He further averred in the affidavit that the sum secured in the acknowledgement of debt in favour of Marenga by the applicant was applicant's own initiative to keep Marenga part of the equation as the first respondent was prepared to pay only $23 million for the property against an asking price of $26 million.

At the hearing of the matter, *Mr Mwonzora* for the applicant invited me to take a robust approach and find, on the basis of the papers filed of record, that the agreement between Marenga and the first respondent had no bearing on the agreement between the applicant and first respondent. He further invited me to hold that the written agreement of sale between the parties was the only agreement between them as provided for in clause 7 of the agreement. Finally, he urged me to compel the first respondent to pass transfer of the property to the applicant as the applicant had performed all her obligations under the agreement. He cited to me clause 7 of the agreement of sale, which provides:

"The terms of this Agreement shall constitute the sole record of the agreement between the parties and supersedes all prior and contemporaneous communications, representations, promises, warranties or agreements (whether oral or written) with respect to the subject matter hereof and no such communications, representations, promises, warranties or agreements shall suspend the operation of, vary, add to the terms of, or otherwise affect the validity or interpretation of this Agreement."

In addition to clause 7 of the agreement, *Mr Mwonzora* also relied on clause 8 which provides that any alterations or variations to the agreement of sale have to be in writing and signed for by both parties.

While he did not refer to the legal principle that he was relying on by name, it appears to me that *Mr Mwonzora* was trying to bar the introduction of any other evidence extrinsic to the written document between the parties. In essence, *Mr Mwonzora* was inviting me to make recourse only to the document between the parties embodying the agreement of sale and to hold as inadmissible the averments by the first respondent that there was a condition precedent to the agreement which was not fulfilled and further, that there was an ancillary agreement between the applicant and Marenga which the applicant breached. In my view, and as correctly pointed out by *Mr Musekiwa*, he could only have been relying on the parole evidence rule for the exclusion of such evidence.

The issue that has exercised my mind in this matter is whether the parole evidence rule applies in the circumstances of this matter to resolve all conflicts of facts that are arising.

The parole evidence rule also known as the integration rule has been a part of our law for decades and holds that when a contract has been reduced to writing, the written document, in general, is regarded as the exclusive memorial of the terms of the transaction between the parties and any evidence extrinsic to the document is inadmissible. (See *Union Government v Vianini Ferro Concerete Pipes (Pty) Ltd* 1941 AD 43).

It is trite that the parole evidence rule is not of automatic application to all written contracts, even where the parties have stipulated that the written agreement constitutes the entire agreement between them as happened in *casu*. The authorities are quite clear that it is a general rule. As a general rule it is subject to exceptions.

The rule is based on the presumed intention of the parties that the written documents embody their entire contract. In my view, it is in this regard that *Mr Mwonzora* heavily relied on clause 7 of the agreement. It follows in my further view that where evidence shows that the parties did not so intend, the rule cannot apply.

In *casu*, the written contract appears to have been varied by the subsequent agreement between the applicant and Marenga, increasing the purchase price of both properties by $3 million. By entering into the separate agreement with Marenga, in my view, the applicant appears to have evinced an intention to be bound by the condition precedent that the deal between Marenga and the respondent had to go through to enable her to acquire the Chegutu property. She makes the admission in her own papers that she went into the agreement to ensure that Marenga did not pullout of his agreement of sale with the respondent. It appears to me that by that admission, the applicant may have destroyed the basis upon which she can successfully rely on the parole evidence rule. It appears to me that by her own conduct, the applicant takes herself outside the application of the rule as her conduct in entering into the separate agreement with Marenga may have altered the agreement between herself and the first respondent.

A conflict of fact arises. The applicant alleges that by entering into the separate agreement with Marenga, she did not intend to alter her agreement with the first respondent. The first respondent argues that she did. Without hearing *viva voce* evidence from the parties and their witnesses as to how the separate agreement was negotiated and concluded, I am of the view that I cannot conclusively decide on the matter without doing an injustice to one of the parties, notwithstanding the prima facie position I may have adopted above on the import of the separate on the original agreement between the parties.

It further appears to me that to allow the words that the parties used in the document to override their common intention to include the sale by Marenga to the respondent as part of the equation is in my view to enforce what was not agreed upon. This is not the basis upon which our law of contract rests. At all times, the common intention of the parties should override all other considerations.

In any event, the parole evidence rule does not prevent the leading of evidence to show that the written contract was subject to a condition precedent not expressed in the document. The first respondent cannot be stopped from leading such evidence. (See R H Christie 3Ed: The Law of Contract in South Africa page 217-218).

In my view, there is a material conflict of fact in this matter relating to whether or not there was a condition precedent to the agreement of sale. That conflict cannot be resolved on the basis of the affidavits filed of record without doing an injustice to one or other of the parties. As discussed above, the effect of the acknowledgement of debt signed by the applicant in favour of Marenga takes centre stage in this dispute and has to be explained by *viva voce* evidence.

It has been argued by the first respondent that the sale of the Chegutu property was subject to her successfully purchasing a property in Harare. The applicant seeks to avoid such a condition precedent. Evidence has to be led from the parties as to whether this was their common intention or not.

Having found that there are conflicts of facts that I cannot resolve on the basis of the affidavits filed of record, it has exercised my mind whether I should dismiss this application or refer the matter to trial. During the hearing of the matter, I did raise some of the conflicts of facts that were arising in this matter. I invited counsel to concede that such were that I could not resolve them without the aid of oral evidence. Counsel was of the view that there were not and invited me to be robust.

The caveat has been sounded before that litigants must choose the form of proceedings with care. Where a conflict of fact is apparent before the proceedings are launched, application procedure should be avoided or the applicant risks having the application dismissed. In *casu*, the conflict must have been anticipated. It was apparent in the applicant's own papers. It became clearer with the filing of the opposing affidavits. It was hinted at during the hearing. Regardless, counsel opted to proceed not taking the hint to have the matter referred to trial.

Taking into account the facts of this matter and the alternative arguments raised orally by *Mr Mwonzora* to the effect that the first respondent has been unjustly enriched by keeping both the purchase price and the property, an issue that does not require determination in these proceedings, it is necessary in my view that the applicant clearly formulates the cause of action that she intends to bring against the first respondent.

In the result, I make the following order:

1. The application is dismissed
2. The applicant shall bear the first respondent's cots.

Mwonzora & Associates, applicant's legal practitioners.

Musekiwa & Associates, 1st respondent's legal practitioners.