WARREN PARK TRUST
and
ANTHONY ENERST PAHWARINGIRA
and
NTOMBIZODWA PAHWARINGIRA
and
DAVY FUKWA MUTINGWENDE
and
CHIPO MUTINGWENDE
and
SALTANA ENTERPRISES (Pvt} Ltd

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 26th February 2009 and 18th March 2009.

Opposed application

Mr *Chihambakwe,* for the applicants.
Mr *Pahwaringira,* in person.
Mr *Mutingwende,* in person.

BHUNU J: The applicant is a trust dully registered in terms of the laws of this country whereas the fifth respondent is a limited liability company registered in terms of the laws of this country. The first to fourth respondents are sole shareholders and directors in fifth respondent *Saltana (Pvt) Ltd*.

The fifth respondent is currently under judicial management. Its judicial manager, *Mr C Madondo* has however, since filed a letter saying that he has no interest in this case and will abide by the decision of this Court. and has sent a representative for an observation brief. That being the case, the question of fifth respondent's *locus standi,* that is to say the right to stand and be heard in court, becomes a non issue.

The first and second respondents are husband and wife. The same applies to the third and fourth respondents. At the commencement of this hearing first and third respondents requested that their wives be excused from the hearing and that they be allowed to represent and speak on behalf of their respective wives to save costs. Their being no objection from counsel for the applicant I granted the two respondents permission to represent and speak on behalf of their wives.

In any case the two wives were already in default and would have had default judgments entered against them anyway. It is highly unlikely that they can successfully apply for rescission of judgment seeing that the defaults appear to be willful and deliberate. For that reason I cannot perceive any prejudice which cannot be redressed by an appropriate order of costs if their husbands are allowed to speak on their behalf with the applicant's consent. In this regard I find the applicant's attitude commendable in that it is not trying to snatch at default judgment but to obtain judgment on the merits

In granting this unusual request I was alive to the peculiar relationship between husband and wife in that they normally have a common interest and household. Generally speaking at common law the husband is the head of the family and has the marital power although the position has been somewhat altered by statute. In Christian parlance they are said to become one flesh and blood at marriage. That being the case I could perceive no impediment or impropriety in a husband representing his wife in a case in which they are jointly being sued and there is no objection from the other party.

The respondents objected to the matter being placed before this Court arguing that the dispute ought to have been referred for arbitration in terms of clause 13 of the contract which provides as follows:

> "In the event of a dispute or a claim arising as a result of a breach of this agreement or other cause arising from this agreement, then the purchaser shall be entitled after notifying the seller before hand, to have the dispute or claim or other cause referred to arbitration."

My reading of the above clause is that it does not compel the applicant to refer the matter for arbitration in the event of a dispute arising. It merely entitles without directing the applicant to refer the dispute for arbitration.

In other words the clause merely confers a discretion on the applicant whether or not to refer the matter to arbitration without impeding its right to approach the Courts for redress. For that reason I hold that the applicant was within its rights in referring the dispute to court for resolution. Having said that, I now turn to determine the matter on the merits.

The facts giving rise to this application are to a large extent common cause. The undisputed facts are that some time in March 2005 the first to fourth respondents hereinafter referred to as the respondents concluded a written contract in terms of which they sold to the applicant their entire shareholding in the fifth respondent to the applicant. The written contract

of sale was subject to various suspensive conditions in favour of the applicant. The contract however conferred upon the applicant the right to waive the suspensive conditions thereby bringing the terms of the contract into force.

The applicant subsequently waived its rights under the suspensive conditions sometime in June 2005and demanded that the respondents perform their part of the bargain in terms of the written contract. The respondents took exception and objected on the basis that they had already cancelled the contract on account of breach of contract In particular they objected on the basis that the applicant had not discharged its obligations under clause 1. 2.18 of the contract. That clause falls under the definition section of the agreement and it provides as follows:

> **"Signature date"** means the date of signature of this agreement by the party last signing. As soon as possible thereafter the amount of $100 million shall be paid to the Sellers in equal portion of $25 million each in such consideration as the Purchaser shall determine at its sole discretion. A further amount of $100 million shall thereafter be paid to the Sellers on similar terms, on the Effective Date."

The respondents acknowledged having been paid the initial $100 million dollars in terms of the above clause but denied having been paid the remaining $100 million dollars The alleged non payment of that amount forms the basis of the respondents' refusal to perform their part of the bargain and purported cancellation of the contract.

The applicant denies that it breached any material terms of the contract as alleged or at all thereby entitling the respondents to cancel the contract. Firstly it denies that it failed to pay the remaining $100 million dollars as alleged by the respondents. This is a factual dispute incapable of determination on the papers. Fortunately, it is not necessary to resolve that factual dispute for the purpose of determining this matter.

Apart from denying that it failed to pay the amounts stipulated in clause 1. 2. 18 of the contract the applicant also argued that the clause was not a material term of the contract but merely constituted a sweetener a sweetener in my view is payment calculated to raise the other party's appetite so as to induce him to contact. Clause 1.2.18 of the contact appears to have all the hallmarks of a sweetener in that it is tied up with the definition of 'the word "signature". It refers to payment of, "<u>such consideration as the purchaser shall determine at its sole discretion.</u> It is inconceivable that had the payment under this clause been intended to be a material term of the contract the parties could have left its payment to the sole discretion of the parties. This provision is different from clause 4 which places an obligation on the applicant to pay on pain

of cancellation and heavy penalties in the event of failure to pay. For that reason I come to the conclusion that clause 1.2.18 is not a material term of the contact the breach of which would entitle the aggrieved party to cancel the contract.

It was the applicant's further argument that it is entitled to compel the respondents to perform their part of the bargain under clause before it becomes liable to pay the purchase price which is not yet due until the price is determined in terms of clause 4 of the agreement.

It might be necessary at this juncture to determine whether the parties concluded a binding contract in view of the fact that the agreement did not fix the price but merely provided a formula for fixing the price.

It is trite and a matter of elementary law that the essential elements of a valid contract of sale comprise:

1. Agreement *(consensus ad idem*) as to:-

    (a) the thing sold, the *(merx)* and
    (b) the price of the thing sold, the (*pretium).*

In other words a contract of sale comprises three essential elements, that is to say:-

(i) an agreement between the parties to buy and sale.
(ii) an agreement on the thing or commodity sold known as the *merx.*
(iii) an agreement on the price known as a *pretium*

R.H. Christie's Business Law in Zimbabwe at pages 144 – 5, E Kahn's, **Contract and Mercantile Law Through the Cases** at page370 and P S Atiyah's **The Sale of Goods** at pages 3-19 are instructive on this well established legal principle on the essential elements of a valid contract of sale.

The material terms of the written contract which form the basis of the contract at hand are to be found under clauses 3 and 4 which provide as follows:-

"3. Sale.

3.1 Subject to the fulfillment or waiver of the suspensive conditions, the seller sell(s) to the Purchaser which purchases the shares from the Effective Date.

3.2 Should the suspensive conditions be fulfilled or waived, then ownership in and the risk and benefit attaching to the Shares will be deemed to have passed to the Purchaser on the Effective Date notwithstanding the fact that this agreement may have been signed after the Effective Date or that the suspensive conditions are fulfilled or waived.

3.3 Each of the Sellers confirms that it has prior to the Signature Date waived any and all preemptive rights it may have in respect of the Shares.

4. Purchase consideration and payment.

4.1 the consideration for the shares shall be an amount equal in the aggregate to 20% (TWENTY PER CENTIUM) of the CVEM *(City Valuer & Estates Manager)* Price as at effective date less the development costs of the stands and the standard commission payable to any estate agent after the said date

4.2 The consideration is payable within ninety days from the date of receipt of the Certificate of Compliance issued by the city of Harare in terms of clause 10 of the agreement.

Undoubtedly the respondents agreed to sell to the applicant the shares stipulated in the written contract in terms of clause 3 for a price to be determined in terms of clause 4 of the written contract. In the ordinary run of things our law requires that the price be fixed before a valid contract comes into being. See Voet (18. 1. 1). This is however not a rule of thump. Where the price though not fixed can easily be ascertained a valid contract comes into being not withstanding the fact that the actual price has not yet been fixed.

It is an everyday occurrence that people often transact perfectly valid contracts of sale leaving the price to be determined at a future date. This prompted LANSDOWN JP in *R v Pearson* 1942 EDL 117 at page 121 to remark that:

> "There are many transactions in which goods pass on sale without a price being stated and the transaction is non the less a sale, if the court can determine from the conduct of the parties and the surrounding circumstances how the price was to be determined."

Like wise the court in the case of *Dublin v Diner* 1964 (1) SA 799 recognised a contract of sale where the purchaser had agreed to purchase the applicant's shares at a price to be determined by the company's auditors. See also *Gilling v Sonnenberg* 1953 (4) SA 675 T.

The above two cases are on all fours with the case at hand where the parties agreed to sell each other shares at a price to be determined by a 3rd party, the City Valuer & Estates Manager. Undoubtedly the price though not stated in this case, it can easily be determined once the City Valuer Manager has carried out the necessary evaluations. I accordingly hold that the parties' respective contracts of sale were perfectly valid and enforceable

The respondents however, resist performing their respective parts of the bargain arguing that they have already terminated the agreement in terms of the written contract on

account of breach of contract. The applicant on the other hand denies that the respondents ever terminated the agreement in the manner alleged or at all. Clause 12 of the agreement lays down the procedure that has to be followed by a party wishing to effect cancellation on account of breach. The clause reads:

"12.Breach

> Should either party commit a material breach of this agreement and fail to remedy such breach within 14 days (fourteen) days of written notice requiring the breach to be remedied, then. the party giving notice will be entitled at its option, either to cancel this agreement and claim damages or to claim specific performance of all the defaulting party's obligations, together with damages if any whether or not such obligations have fallen due for performance. The defaulting party shall become liable for all legal fees incurred by the aggrieved party (on a Legal Practitioner and Client scale) including collection fees incurred by the aggrieved party seeking such redress whether through the courts or arbitration. As provided for herein."

The applicant denies having been given the requisite 14 days notice. That being the case the onus was squarely on the respondents to establish on a balance of probabilities that they complied with the mandatory requirements of clause 12 of the agreement. Apart from their mere say so, the respondents have not been able to produce any shred of evidence that they gave the applicant the necessary 14 days written notice. The respondents were obliged o produce a copy of the written notice or at least tender an explanation as to why it was not available. This they did not do.

When writing to counsel for the fifth respondent Saltana Enterprises on the issue of written notice in a letter dated 10th January 2006 the respondents resorted to generalizations and subterfuge. This is what they had to say in paragraph 2 of their letter:

> "Could you please give the lawyers the letter attached to this one where we cancelled the agreement because they failed to honour it. They were given their 14 days notice, and even if they were not, surely by now more than six months after the cancellation they have been in a position to appreciate that we were carrying on without them."

What emerges quite clearly from the above paragraph is that the respondents have proffered written evidence of the letter dated 11th July 2005 canceling the agreement of sale They have however, not proffered any evidence tending to show that they gave the vital 14 days written notice. They do not have any evidence as to when it was written and as to when, where and how it was served or delivered to the applicant.

Our law requires not only that the notice to cancel be properly delivered but also proof that it was in fact received by the other party. See *Cohen and another v Lench 2007 (6) SA 132* Thus in the absence of any averments that the alleged notice was properly served and received one cannot assume that it was so served and received In the circumstances of this case, I have therefore no hesitation whatsoever in concluding on the papers before me, that the respondents have dismally failed to proffer any evidence tending to suggest that they gave the requisite 14 days notice to cancel the agreement.

It is now settled law that where the parties have agreed on a particular mode of termination of their contract it must be followed to the letter. In the words of Korsah JA in *Minister of Public Construction & National Housing v Zesco (Pvt) Ltd 1989 (2) ZLR 311 At page 316:*

> "Where parties to a contract have agreed upon a procedure for terminating an agreement, they are bound by the provisions spelling out those procedures as if they have been imposed upon them by law, and a departure from the agreed procedure will not result in an effective termination of the contract."

Those wise words signify the time honoured principle of the inviolability and sanctity of contract. It is therefore, in the public interest that agreements freely entered into must be honoured. And it is the unwavering duty of the courts to give effect to all lawful binding agreements see *Book v Davidson 1988 (1) ZLR 365 at page 369 F*. For that reason our courts lean in favour of upholding binding contracts rather than their abrogation. This prompted the Court in *Madoo (Pty) Ltd v Wallace 1979 (2) SA 957* to remark that:

> "Our system of law pays great respect to the sanctity of contact The Courts would rather uphold than reject them."

On the papers before me, I am satisfied beyond question that the respondents' purported cancellation of the written contract was a nullity and of no force or effect in so far as they failed to observe the cancellation procedure laid down in the contract. More particularly in that, they failed to give the requisite 14 days notice to cancel the contract on account of the alleged breach.

For the foregoing reasons, I therefore, come to the conclusion that the respondents are firmly bound and are liable to perform their part of the bargain in terms of their written contract of sale.

As the first and third respondents' spouses did not appear to oppose the application they shall not be required to meet the costs of opposing the application.

It is accordingly ordered:

1 **That upon receipt of the purchase price calculated in terms of clause 4 of the contract of sale and fulfillment of all the applicant's contractual obligations under the contract**.

1.2 The 1st, 2nd, 3rd and 4th respondents be and are hereby ordered to sign all documents necessary to transfer all their respective shares in 5th respondent to the applicant

1.3 The 1st , 2nd , 3rd and 4th respondents be and are hereby ordered to deliver to the applicant:-

(a) all documents and books of accounts, registers, contracts, minute books, salary records and other documents and records relating to the 5th respondent, and

(b) such documents, powers of attorneys and authorities as may be reasonably required by the applicant to enable it to acquire ownership of 5th respondent's shares and or beneficial interest therein, the business assets or the registration in the name of any of the business assets, should the need arise.

1.4 The 1st , 2nd , 3rd and 4th respondents be and are hereby ordered to sign documents resigning as directors of the 5th respondent, failing which the Sheriff of Zimbabwe or his lawful deputy be and is hereby authorised to sign all necessary documents (in particular Form CR 14) removing the current directors of 5th respondent and substituting the same with applicant's appointees.

1.5 The 1st , 2nd , 3rd and 4th respondents and all those claiming through them, be and are hereby interdicted and or restricted from carrying on any developments and or works in furtherance of the 5th respondent's business operations without the applicant's written approval.

1.6 The 1st and 3rd respondents be and are hereby ordered to pay the costs of this application.

2. For the avoidance of doubt it is ordered that the applicant be and is hereby authorised to enforce it's contractual rights against the respondents only upon due fulfillment and discharge of all its contractual obligations under the written contract **annexture "A**"

Chihambakwe, Mutizwa & Partners, 1st to 4th respondents legal practitioners.