AGRO CHEM DEALERS (PVT) LTD
versus
STANLEY GOMO
and
CITY OF HARARE
and
RONALD AJARA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 11 February 2009 and 6 April 2009

O Mutero for the applicant
H Zhou for the first respondent
T Hussein for the 2nd respondent

GOWORA J: In 1995 the applicant (Agro Chem) purchased an undeveloped stand (the stand) from the second respondent (City of Harare). The full purchase price was paid. In terms of the agreement, Agro Chem was enjoined to undertake certain minimum developments on the stand within a stipulated period after the purchase. It is common cause that no development has been undertaken on the stand by Agro Chem. Sometime in June 2008 it came to the attention of officials in Agro Chem that developments were being undertaken on the stand in question. After investigations it emerged that the first respondent (Gomo) had moved onto the stand. He had purchased the same from City of Harare. A copy of such agreement has been attached to papers filed on his behalf and the contract between the two was concluded on 12 May 2008. There seems to be some dispute as to whether or not the parties did conclude an agreement of sale or whether in fact the stand was awarded to Gomo as a retrenchment package. It is common cause that Gomo is a former employee of City of Harare. I do not believe that it matters for purposes of resolution of this dispute what the nature of the transaction was. I will therefore accept that Gomo purchased the stand from the City of Harare. The applicant had the property transferred to itself before the developments envisaged in the agreement were effected. The applicant has now approached the court seeking the eviction of Gomo from the stand.

Both respondents have opposed the relief being sought by Agro Chem. Gomo is opposed to the relief on the basis of his agreement with City of Harare. He is also of the view that Agro Chem has now lost its title to the stand because City of Harare had cancelled the agreement. The view of City of Harare is that Agro Chem failed to undertake developments within the period set in the agreement and that as a result it, City of Harare, had cancelled the agreement and repossessed the stand. It is pertinent to note at this juncture that although the City of Harare wrote letters to Agro Chem there is no other action that has been taken by it to repossess the stand in question. As a result of certain submissions made by counsel for the two respondents I requested that additional heads of argument be filed in relation to those submissions.

Before I go into the merits of the application it is only pertinent that I examine the basis upon which Agro Chem seeks the eviction of Gomo and discuss the legal status of the stand as matters stand presently. It is not in dispute that the stand is registered in the name of Agro Chem, such title having been registered in favour of Agro Chem on 20 November 1995. Registrations of title in land are made in terms of the Deeds Registries Act [*Cap 20:05*], the Act, specifically s 14 thereof which provides as follows:

'Subject to this Act, or any other law-

a) the ownership of land may be conveyed from one person to another only by means of a deed of transfer executed or attested by a registrar;

b) other real rights in land may be conveyed from one person to another only be means of a deed of cession attested by a notary public and registered by a registrar;

Provided that attestation by a notary public shall not be necessary in respect of the conveyance of real rights acquired under a mortgage bond.

The registration of title in one's name constitutes the registration of a real right in the name of that person. A real right is a right in a thing which entitles the holder to vindicate his right, i.e. to enforce his right in the thing for his own benefit as against the world; that is against all persons whatsoever.[1] Another definition of a real right is that it is a right in a thing which confers on the holder of the right an exclusive benefit in the thing which benefit is indefeasible by any other person. What, then, are the consequences attendant upon the

[1] See Wille's Principles of South African Law 8ed p 259

acquisition of a real right of this nature? The effect of registration of a person's name as owner of a piece of land is that he is the owner of the land including the permanent buildings on it, in the absence of fraud, error or other exceptional cases. Thus it is a principle of our law that the *dominium* in immovable property remains in the seller until the same is registered in the name of the purchaser. It follows therefore that an owner of property cannot be deprived of his property against his will. Consequently no person who is not the owner can transfer ownership in anything whether or not such transferor was acting in good faith or *mala fide.* Since an owner cannot be deprived of his property against his will, conversely, such owner is entitled to recover his property from anyone who possesses the property without his consent. I am fortified in this view by the comments of JANSEN J.A. in *Chetty v Naidoo*[2] to the following effect:

> "……..It may be difficult to define *dominium* comprehensively (c.f. *Johannesburg Municipal Council v Rand Townships Registrar and Others* 1910 T.S. 1314 at pa 1319), but there can be little doubt (despite some reservations expressed in *Munsamy v Gen-gemma* 1954 (4) S.A. 468 (N) at pp 470H-471E) that one of incidents is the right of exclusive possession of the *res,* with the necessary corollary that the owner may claim his property wherever found, from whomsoever holding it. It is inherent in the nature of ownership that possession of the *res* should normally be with the owner and it follows that no other person may withhold it from the owner unless he is vested with some enforceable right against the owner (e.g. a right of retention or contractual right). The owner in instituting a *reivindicatio,* need, therefore, do no more than allege and prove that he is the owner, and that the defendant is holding the *res*-the *onus* being on the defendant to allege and establish any right to continue to hold against the owner (c.f. *Jeena v Minister of Lands* 1955 (2) S.A. 380 (A.D.) at pp 382E-383). It appears to be immaterial whether in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (*Krugersdorp Town Council v Fortuin* 1965 (2) S.A. 335 (T)). But if he goes beyond alleging merely his ownership and the defendant being in possession (whether unqualified or described as "unlawful" or "against his will", other considerations come into play."

With the exception of certain instances where title may have been through fraud, the transfer of ownership in a piece of land transfers *dominium* in such land from the holder to the purchaser and thus bestows on the transferee rights control and possession of the land which rights are completely unfettered except as may be subject to conditions in the deed of transfer. In *Willoughby's Consolidated Co. Ltd v Copthall Stores Ltd*[3], LORD DE VILLIERS stated:

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[2] 1974 (3) S.A. 13 at 20A-E
[3] 1913 A.D 267 at 276

> "…….There is no principle more clearly established in our law than that a clean transfer of land *coram lege loci*, which is in the nature of a semi judicial act, passes the *dominium* to the transferee, and that, except perhaps in the case of ownership acquired by prescription, the title appearing on the title deed is conclusive in favour of a *bona fide* purchaser, to whom such transfer has been effected. Even when land has been acquired by prescription the practice is for the party who has so acquired it to institute an action for duly registering his acquired rights in the Deeds Office."

When an owner of property delivers the property sold and has the capacity of alienation, or if he is not the owner but has the consent of the owner to alienate, the effect of delivery is to transfer to the person of the purchaser the property in the thing sold, provided the purchaser has paid for the property or has been granted credit by the seller. On delivery, the purchaser obtains a *ius in re*, a real right in the thing sold. With respect to immovable property delivery is achieved through registration in the Deeds Office, as was decided in *Harris v Buissine's Trustee, 2 M*. The pertinent passage from the judgment is as follows:

> "By the law of Holland the *dominium* or *ius in re* of immovable property can only be conveyed by transfer made *coram lege loci*, and this species of transfer is essential to divest the seller of, and invest the buyer with, the *dominium or ius in re* of the immovable property, as actual tradition is to convey the *dominium* of movables and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium.*"

A passage to the same effect is found from C.I. Belcher in his book Norman's Purchase and Sale in South Africa 4 ed quoting from Pothier, *Vente*, 319 *et seq* had this to say:

> "When the vendor is the owner of the thing sold and has a capacity of alienation, or, if he is not, when he has the consent of the owner, the effect is to transfer to the person of the purchaser the property in the thing sold provided the purchaser has paid the price or the vendor has given him credit for it. The contract of sale by itself cannot produce this effect. Contracts can only make personal engagements between the parties. It is only delivery made in pursuance of the contract which can transfer the property in the thing sold according to the rule *Traditionibus et usucapionibus domina rerum non nudis pactis transferantur*."

Once City of Harare had sold and transferred the *dominium* in the stand it lost any right to treat the property as its own. It could sell the stand to Gomo as it did but it could not transfer the *dominium* in the same as it had lost it when it sold and transferred the same to Agro Chem. The purchaser thus has the right to defend his rights in the property against the world at large.

The two respondents have however sought to oppose the application on the basis that the contract of sale has been cancelled and that not only does the City of Harare have the right to sell it, it (City of Harare) can deal with the property in any manner it deems appropriate. I will therefore examine the defences mounted by the respondents to the application. To put matters in context it is appropriate to start with the second respondent, City of Harare.

It is contended on behalf of both respondents, both in the opposing affidavits and in the supplementary heads of argument requested by myself, that not only had the City of Harare cancelled the agreement of sale it had commenced the process of re-transfer in terms of clause 12 of the agreement of sale. Both make reference to two letters allegedly sent to Agro Chem by City of Harare, the letters are dated 26 February and 20 June 2008 respectively. The deponent to the answering affidavit filed on behalf of Agro Chem denies having received the letters in question. According to the respondents, Agro Chem did not respond to the letter of 20th June which required that it surrender the title deeds to the legal practitioners of the local authority as demanded and therefore its silence meant that it had not challenged the process of re-transfer that had been started by the local authority. The submission is also made that the cancellation of the agreement of sale had also not been challenged. I am being entreated by the respondents to enquire into the agreement and the terms and conditions of the same.

Both respondents contend that the agreement between the City of Harare and Agro Chem was cancelled due to non performance of its contractual obligations by the latter and that therefore the City of Harare was entitled to sell the stand anew to Gomo. Although both respondents talk of the agreement as having been cancelled, it seems that of the two, Gomo was certainly alive to the need to have something done about the agreement and to have the transfer to Agro Chem set aside before any meaningful action could be taken in having the property transferred to him. It seemed that this necessary legal process completely escaped the local authority. The mere demand by it of the return of the deed of transfer does not in itself reverse ownership in the stand from Agro Chem to itself. Equally the lack of response to the alleged letters of cancellation does not, in itself exhibit that the recipient has accepted that the property has changed hands as contended on behalf of the respondents.

According to the local authority when the parties signed the agreement both were aware that ownership would be determined only upon the development of the property. I have not been referred to any authority that would convince me to accept this submission and find

that ownership in the stand, notwithstanding the transfer to Agro Chem would still be uncertain. I have examined the deed of transfer that is attached to the papers and it does not have any conditions in which there is any limitation on the vesting of title in the title holder. Mr *Hussein* has referred me to s 154 of the Urban Councils Act [*Cap 29: 15*] which provides as follows:

> **"Conditions of title to land transferred by municipal council**
> In the case of land granted to a municipality it trust for the inhabitants of the municipality, such area being known as municipal township land, which was granted subject to the conditions that-
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> (a) the British South Africa Company or the Governor of Southern Rhodesia shall have the right to resume ownership of and to retake possession of the said land or any portion thereof on payment of such compensation as may be mutually agreed upon, or failing such agreement, as may be determined by arbitration; and
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> (b) the right to all minerals in or the power to make grants of the right to prospect for minerals on that land was reserved, either to the British South Africa Company or the Governor of Southern Rhodesia;
>
> any such land which is or has been transferred whether before or after the date of commencement of this Act, by the municipality or by any successor in title to the municipality shall be deemed to have been transferred and shall be held, notwithstanding anything to the contrary in any other law, subject to the conditions referred to in paragraphs (a) and (b) which were applicable to the municipal township land concerned, save that any reference to the British South Africa Company or the Government shall be construed as reference to the President, and subject to any other conditions that may be imposed by the municipality or any subsequent owner of the land."

It is correct, as contended on behalf of the City of Harare that, in terms of the section local authorities have been accorded the right to impose conditions on the transfer of such land. in the transfer of lands falling under municipal township lands which would have devolved upon such local authorities by way of grants from central government The deed of transfer exhibited to me does not contain conditions apart from a servitude registered in favour of the municipality and the further requirement that any transfer from the title holder will require its prior written consent. I will assume that the reservation for resumption of title and the right to prospect for minerals provided for in the section quoted in the heads of argument are also applicable. Other than these remarks, I find no relevance in the section referred to the

current dispute. The title deed did not impose any conditions other than those that are stated on the same and we are not in this dispute dealing with a resumption of ownership by the State or a dispute relating to mineral rights. Mr *Hussein* makes the submission that the conditions referred to in clause 12 of the agreement did not have to be mentioned in the deed of transfer. I am not sure by that submission if he means that the section he quoted gives his client the right to summarily expropriate any municipal land. To begin with, his client is a local authority and cannot be equated under any circumstances to the President as provided for in the quoted section. In any event, his client has not set in motion any legal process to reclaim the stand apart for the alleged letters that I have made reference to above. The view I take is that the attempt to rely on s 154 of the Urban Councils Act does not assist his client's position at all.

I do not have before me the issue of the cancellation of the agreement between City of Harare and Agro Chem and I am mindful that it is therefore incumbent upon me to tread very carefully in this enquiry lest I compromise any future proceedings in connection with this matter. However, it appears to be the position of the respondents that the agreement between Agro Chem and City of Harare has been cancelled and it is therefore virtually impossible to decide the dispute without considering the position they have adopted. The point was made by Mr *Hussein* that upon receipt of the letters allegedly sent to Agro Chem the latter should either have complied with the demand to hand over the title deeds or seek a declaratory order raising its entitlement to the claimed property. I have already dealt with the lack of co-operation to return the title deeds and I will deal here with the suggestion that Agro Chem should have sought a declaratory order.

This was apparently to deal with the conflict which is in the agreement and the title deed. If the local authority finds that there is a conflict in the agreement and the title deed then it would be within its rights to have such conflict resolved by the court. The local authority has not seen fit to do the same and has instead been content to defend a vindicatory action brought by the title holder to evict a claimant to the stand in question. A court cannot resolve a dispute that has not been brought before it for specific relief.

In so far as the issue that the agreement was cancelled is concerned, the attitude of Agro Chem is that any claim by the local authority seeking the cancellation has now prescribed. The agreement was concluded in 1995 and transfer to the purchaser was effected before the year was up. In terms of s 15 (d) of the Prescription Act [*Cap 8: 11*] a debt shall

prescribe after a period of three years. Debt, in the Act is defined as, without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise. It therefore goes without saying that the claim for cancellation of the agreement of sale is a debt which then would prescribe within three years. Although this submission was made in the heads of argument filed on behalf of Agro Chem, the issue was not discussed by the local authority. My prima facie view is that any attempt on the part of the local authority to seek cancellation and retransfer will be met with the defence of prescription and I cannot fathom of any factor that may be available to counter it.

It is trite that where cancellation is lawful and justified on account of breach it takes effect from the time that the innocent party communicates the breach to the defaulting party. For this proposition, see *Bako & Anor v Bulawayo City Council*[4], wherein GUBBAY CJ stated the following dicta:

> "Thus, it is those actions and events which occurred after 23 March 1992 to which regard must be had in determining whether the resistance to the cancellation was justified in law; for cancellation takes effect from the time it is communicated to the other party. See *Swart v Vosloo* 1965 (1) SA 100 (A) at 105 (G); *Phone-A-Copy World-wide (Pty) Ltd v Orkin & Anor* 1986 (1) SA 729 at 752A-C."

It is common cause that the letter in which the local authority sought to cancel the agreement of sale was written on 26 February 2008 which was a period well in excess of twelve years after the contract was concluded. I do not think that it can be argued that Agro Chem did not breach the agreement. It did not perform part of the obligations imposed on it in the agreement, in that it failed to construct buildings of a minimum standard and value as demanded by the agreement. It is not in dispute that prior to the letter of 26 February 2008, there was no intimation on the part of the local authority that it was canceling the agreement due to the breach. The local authority therefore was within its rights to elect to cancel the agreement due to the breach. It is common cause that instead of acting on the breach the local authority went on to have transfer of the stand registered in the name of Agro Chem. In his heads of argument, Mr *Hussein* took issue with the date on the Power of Attorney that was prepared in respect of the transfer to Agro Chem. This averment, which is evidentiary in nature

[4] 1996 (1) ZLR 232 at 240F

is made as a submission in the heads of argument. If indeed there was issue to be taken on the date on the Power of Attorney the appropriate manner of bringing it to the attention of the parties was by averment under oath in the opposing affidavit, which was not done. Indeed, one would have expected that the document itself would have been exhibited to the court as part of the papers used by the local authority in opposing the application. In any event, why would the local authority question the authenticity of the Power of Attorney when transfer is not being challenged? The moot point however, is that in all this debacle the local authority has never sought to have the transfer reversed even if one were to accept that it was effected in an irregular manner.

Again in the heads of argument it is submitted that the local authority waived its rights to claim cancellation of the contract. According to Christie-The Law of Contract 3ed p 488 there is a presumption against waiver of contractual rights even in some cases strongly suggesting the same. Thus there is a heavy evidentiary burden on the party alleging waiver to establish the same on a balance of probabilities. In considering the question of waiver, I am reminded that the issue was brought up in written submissions and was not raised as an averment in the papers filed by the parties. An examination of the facts as presented on the papers may throw some light, as to whether, despite not having raised it on the papers, Agro Chem can rely on the issue of waiver as submitted in the heads of argument. In the opposing affidavit filed on behalf of the local authority there is an acceptance that the property was transferred to Agro Chem and that demand of the Deed of Transfer was made by a letter dated 26 February 2008. This is the cancellation that is being relied on to defeat the claim for eviction. It seems to me that by transferring the stand to Agro Chem the ocal authority elected to abide by the contract. The local authority in fact discharged its obligations in terms of the agreement between the parties. If the innocent party to the contract elects to abide by the contract, he cannot thereafter rescind it for the original breach, even though a subsequent breach may give rise to a fresh right to cancel. Thus a tacit election to affirm the contract may be viewed as a form of waiver. As to what amounts to an election this is what SANDURA JA said in *Guardian Security Services (Pvt) Ltd v ZBC*[5]*:*

> "……It is clear that election generally involves a waiver. One right is waived by choosing to exercise another right which is inconsistent with the former."

[5] 2002 (1) ZLR 1 (S) at 7A-B

What is referred to as the doctrine of election was discussed in the earlier case of *Segal v Mazzur*[6] at pp 644-5 by WATERMEYER AJ in the following terms:

> "Now, when an event occurs which entitles one party to a contract to refuse to carry out his part of the contract, that party has the choice of two courses. He can either elect to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but once he has made his election he is bound by that election and cannot afterwards change his mind. When he has made an election one way or another is a question of fact to be decided by the evidence. If, with knowledge of the breach, he does an unequivocal act which necessarily implies that he has made his election one way, he will be held to have made his election that way; this is, however, not a rule of law, but a necessary inference of fact from his conduct….."

The evidence I have to consider is none other than the Deed of Transfer in favour of Agro Chem as well as the agreement of sale itself, specifically the latter, the pertinent part of which is as follows:

> 12 a) THE PURCHASER shall effect or cause to be effected on the stand principal buildings designed for industrial manufacturing, factory or other purposes permitted by the Municipality to the minimum value of $750 000.00
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> b) Such buildings shall be commenced on the stand within six months from the date of sale and shall be duly completed within twelve months from such date. If such buildings have not been commenced or completed as aforesaid then in either case the Municipality shall ipso facto be entitled to cancel the sale of the stand or claim retransfer as the case may be. If the sale of the stand is cancelled or the stand is claimed in terms of this clause for default in the payment of the balance of the purchase price or any interest thereon or by mutual consent then the Municipality shall refund to the purchaser the amount paid in respect of the purchase price of the stand plus compensation for any buildings or other permanent improvements.

The agreement was concluded on 29 March 1995. When regard is had to clause 12 (a) and (b) therefore the building of improvements with a minimum value of $750 000.00 should have commenced within six months of the date of conclusion of the agreement. Transfer to Agro Chem was effected on 20 November 1995, which is a period just short of seven months after the agreement was concluded. It was obvious at that date that no improvements had been effected on the stand and that the purchaser might be *in mora* in the performance of its

[6] 1920 CPD 634

obligations. There is no suggestion on the papers that it sought an extension of time within which to comply with that particular obligation, yet, notwithstanding this failure to abide by the conditions set in the contract, the property was transferred to the purchaser. This failure to build on the stand is the reason that the local authority seeks to rely on in alleging cancellation of the contract. In my view, an event entitling the local authority to seek cancellation occurred before the transfer was effected yet the local authority elected to discharge the last of its obligations in terms of the contract. I will not dwell on the suggestion by *Mr Hussein* that in view of the date of the Power of Attorney the transfer must have been fraudulent. I take judicial notice of the fact that other than a power of attorney other documents are submitted for purposes of transfer and if indeed it was felt that the transfer had been irregular something would have been done by now to set it aside on the basis of such irregularity.

It was decided by SANDURA JA[7] that in determining whether or not the facts established an intention to waive a right in a contract a court had to apply the objective test. The learned judge of appeal had this to say:[8]

> "I find support for my views in number of South African cases. In *Palmer v Poulter* 1983 (4) SA 11 (T) at 20C-D, ACKERMAN J, in delivering the judgment of the Full Bench, said:
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> "If the appellant, with full knowledge of the facts has so conducted herself that a reasonable person would conclude that she had waived her accrued right to cancel the agreement or had affirmed the agreement, a mental reservation as to the contrary will not avail her".

The objective test therefore prevailed. That decision was followed by the full bench of the Cape Provincial Division in *Multilateral Motor Vehicle Accidents Fund v Meyerowitz* 1995 (1) SA 23 at 27. Subsequently, in *Bekazaku Properties (Pty) Ltd v Pam Golding Properties (Pty) (Ltd)* 1996 (2) SA 537 (C) at 543J-544A, FRIEDMAN JP, in delivering the judgment of the full court, said:

> "If the innocent party with full knowledge of his rights performs an unequivocal act from which a reasonable person would necessarily infer that he has elected to affirm the contract, he would be bound thereby, whatever subjective reservations he might have had. On the other hand, if the act on which it is sought to rely for the existence of an election is not unequivocal, regard must be had to the subjective considerations

[7] Guardian Security Services P/L v ZBC (supra)
[8] At p 7D-H

> which motivated the party concerned in order to determine whether the act in question does in fact constitute an election or not"."

Applying these principles to the facts of this matter it leaps to the mind that the conduct displayed on the part of the local authority' s officers an impression was created that not only was the latter affirming the contract, it was complying with all its obligations under the contract of sale. A transfer to Agro Chem could not have been effected without the specific authorization of the seller. Documents necessary for such transfer would have been drawn up and signed by authorized signatories on behalf of the local authority. At the time the decision to transfer title to Agro was made there must have been an awareness that there had been no compliance with the requirement to effect the minimum improvements on the stand as required by the agreement of sale. Notwithstanding the knowledge that the conditions had not been complied with it took the local authority almost thirteen years before it called up the agreement. If such dilatoriness in seeking to enforce a right in a contract is not indicative of a waiver of a right to cancel it would be difficult to imagine what else such conduct constitutes. In the *Guardian Security* case SANDURA JA considered that a period of twelve months before an innocent party decided to terminate an agreement based on the alleged breach of the same by the other party to the contract is not a reasonable period. *In casu* more than a decade went by before the local authority decided to do something. Even then, its attempt to enforce its rights under the agreement cannot even be termed half-hearted. They are virtually non-existent. Having had transfer in the stand registered in the name of the purchaser it cannot have escaped notice that what was required, if at all it was still possible, was an effort to have the transfer set aside. It has not done so and would in all probability not have come to court to allege cancellation of the agreement if the purchaser had not dragged it to court in a bid to evict Gomo. From the facts established on the papers it is my view that the local authority never reserved its rights in the contract, and that if it did those reservations were never communicated to the purchaser. It is my finding that it elected to abide by the agreement notwithstanding the default by Agro Chem to construct improvements as required by the agreement. I find therefore that there was waiver on the part of the local authority and it cannot now rely on cancellation to seek to prop up the defence proffered by Gomo to defend the claim mounted for his eviction from the stand.

I turn now to consider the opposition mounted by Gomo against the claim for eviction. It seems to me that strength of his defence to the claim is wholly dependant on how successful the local authority is in defending its own position in this dispute. The basis of the defence was that the agreement had been cancelled and I have found that there was no cancellation as by the time the local authority sought to cancel the agreement transfer had been effected the result of which was to vest *dominium* in the stand in Agro Chem.

It was contended on behalf of Gomo that an aggrieved party to a contract of sale has the option of not only canceling an agreement of sale but also claim cancellation and restitution of what he has paid over or transferred under the contract. In *casu*, cancellation was communicated more twelve years after default occurred and there has been no effort on the part of the seller to claim re-transfer in the stand. Apart from an excerpt from Kerr I was not referred to any authority to bolster the contention that after the transfer of real rights to it, Agro Chem could be compelled to retransfer the stand on the basis of a breach which occurred prior to the registration of real rights in its name. In the supplementary heads of argument filed on his behalf Gomo contends that the reversal of transfer was in terms of clause 12 (a) of the agreement of sale between Agro Chem and City of Harare. Unfortunately for Gomo there has been no process filed to have the transfer set aside and Agro Chem therefore remains the registered owner of the stand. It is a correct statement of the law that a seller has an option to cancel and to claim restitution of *merx*, even where there has been delivery. The question I posed to Mr *Zhou* was whether in fact a seller, after having transferred land and authorized its registration in the name of the purchaser can cancel the contract and obtain retransfer. I have not been pointed to any authorities on the issue in point. The only authorities I have had occasion to read are those where either movables were the subject of the sale or, if an immovable was the subject matter, then cancellation would be before transfer of rights to the purchaser.

In this regard I have been invited to look at the conditions of the agreement by Gomo, which conditions he contends were not performed by Agro Chem. It was contended further that the court *in casu* could not ignore the agreement of sale as it recorded the intention of the parties vis-à-vis the transfer. It is further contended that the election to claim rescission of a contract and the return of the thing sold is available to a seller where the contract contains a clause (*a lex commissoria*) providing for rescission in the circumstances in question. Indeed

the agreement which gave rise to this application does contain a clause for rescission, but the local authority apart from the letters I have mentioned above has not sought to have the sale set aside and the property retransferred to itself.

The arguments being presented by Gomo would be more properly and appropriately made if they were being presented on behalf of the local authority. As he was not a party to the agreement I cannot accept that Gomo has even a modicum of standing to make submissions in relation to the dilatoriness on the part of Agro Chem in the performance of its obligations under the agreement. There is before me no application for a reversal of the transfer and to embark on this enquiry appears to be a futile exercise. I also find that the suggestion that the court look at the intention of the parties to the contract is ill-conceived. A party who was not privy to a contract which is the subject matter of a dispute cannot make submissions in relation to the intention of the parties to the contract with any conviction. Any suggestion of what the parties thereto may have intended can at best be described as conjecture. Only the parties to the contract can speak to the terms and conditions thereof and whether or not such terms accord with the intentions of the parties at the time the contract was concluded. In any event the agreement of sale was antecedent to the transfer and once transfer is effected the court cannot revert to the agreement except in certain exceptional circumstances not pertinent to this dispute.

It was further contended on behalf of Gomo that what was before the court was a situation which was akin to a double sale and that therefore the principles applicable to a double sale should be applied in determining this dispute. I do not see how the situation I am dealing with can be akin to a double sale. The local authority sought to sell what was no longer its property. It is correct as submitted by Mr *Zhou* that a person can sell property that belongs to someone else. The only problem is that the effect of registration of rights in land is that the registered owner has the right to defend his right in the property against the world at large. Gomo cannot get title because the vendor in his case had no title to pass to Gomo.

It is not necessary in my view to embark on another exercise as to whether or not Agro Chem was in possession of the stand. It is for the trespasser to establish a right to be on the

stand. In *Chetty v Naidoo*[9] JANSEN JA, quoting with approval the dicta in *Jeena v Minister of Lands*[10] stated thus;

> "…….The owner, in instituting a rei vindication, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res-the onus being on the defendant to establish any right to continue to hold against the owner (cf.. *Jeena v Minister of Minister* 1955 (2) S.A. 380 (A.D.) at pp 382E, 383)". It appears to be immaterial whether, in stating his claim, the owner dubs the defendant's holding "unlawful" or "against his will" or leaves it unqualified (*Krugersdorp Town Council v Fortuin,* 1965 (20 S.A. 335 (T)"

The right claimed by Gomo cannot withstand a claim by the owner for eviction, the former not having proffered a justifiable reason for being on the stand. The registered has a right to vindicate his property against anyone unless a lawful defence is presented against the claim. No such defence has been established on these papers and it is my finding that the applicant has established a claim for the eviction of Gomo from the stand.

In the premises I make an order in the following terms:

It is ordered that:

a) The respondent and any person claiming occupation through him be and are hereby ordered to vacate Stand 404 Willowvale Township of Willowvale, situate in the District of Salisbury, within ten (10) days of the date of service of this order and in the event of the first respondent or any person claiming occupation through him failing or refusing to vacate the stand in question, then the Sheriff for Zimbabwe or his lawful Deputy be and is hereby authorized to evict them from the same and give vacant possession to the applicant.

b) The costs of this application shall be borne by the first and second respondents jointly and severally, the one paying the other being absolved.

Sawyer & Mkushi legal practitioners for the applicant
Hussein, Ranchod & Co legal practitioners for the first respondent
Gill, Godlonton & Gerrans legal practitioners for the second respondent

[9] 1974 (3) SA13 at 20C
[10] 1955 (2) SA 380 9A.D)