LUCIA MUNYANYI
versus
LIMINARY INVESTMENTS
and
ISRAEL GUMUNYU.N.O.

HIGH COURT OF ZIMBABWE
MAKARAU JP
Harare 11 and 24 February 2010.

OPPOSED APPLICATION

Mr P K Mangwengwende for applicant
Ms M Matimati for 1st respondent.
2nd respondent in default.

MAKARAU JP: The facts of this matter are largely common cause. I set them out as follows.

On 27 March 2009, the applicant and the first respondent entered into a written agreement of sale in terms of which the applicant sold to the first respondent certain immovable property fully described as Stand 2902 Bluff Hill Township of Bluff Hill Township measuring 3738 square metres, for the sum of US$230 000-00. It was a specific term of the agreement of sale that the purchase price would be paid as to a deposit of $130 000-00 upon the signing of the agreement and the balance on or before 30 June 2009. It was also a specific term of the agreement of sale that all payments due from the first respondent under the agreement of sale would be paid off by a Dr Mushonga. Transfer of the property was to be effected in favour of the first respondent upon the payment of the purchase price in full. In terms of clause 7 of the agreement of sale, occupation of the property would be given to the purchaser on the date of transfer.

It is further common cause that the deposit stipulated in terms of the agreement of sale and a further payment of $37 000-00 were made by Dr Mushonga to the applicant, making a total payment of $167 000-00. This left a balance in the sum of $63 000-00. Despite demand, the balance of the purchase price was not paid during the lifetime of Dr Mushonga who passed away in August 2009.

Prior to the passing on of Dr Mushonga, the applicant had parted with possession of the property and had allowed the first respondent to take occupation of the same. This was on the understanding that Dr Mushonga would pay up the balance of the purchase price on due date. In view of the fact that the balance of the purchase price remained outstanding after due date, the applicant wrote to the first respondent and to Dr Mushonga, demanding payment within seven days failing which she would require the premises for her own occupation. The demanded payment was not made and the first respondent did not vacate the property, prompting the applicant to file this application, seeking the eviction of the first respondent from the property.

The application for eviction was resisted. In opposing the application, the first respondent took no issue with the facts of the matter as narrated by the applicant in her founding affidavit. The deponent to the opposing affidavit, one Emerenciana Mapurisa, who is in beneficial occupation of the property however added that the applicant of her own volition offered the first respondent occupation of the property even before the first installment was paid under the agreement of sale. While not disputing that the agreement of sale stipulated that occupation would be given upon transfer, the first respondent contended that this clause was never implemented as the applicant waived her right to enforce this provision by granting the first respondent occupation on an earlier date and before the full purchase price had been paid.

It is instructive in my view at this stage to set out in full the applicant's averments as to how and why she parted with possession of the property. This is what she said in paragraph 12 of her founding affidavit:

"In good faith, I allowed 1st respondent to take occupation of the property prior to full settlement of the purchase price on the understanding that the late Dr Mushonga would pay the outstanding amount in terms of the agreement of sale by 30 June 2009. This indulgence was in no way a waiver of my rights to possess the property which right continues to subsist as long as final payment of US$63 000-00 has not been paid."

The issue that arises in this application is in my view simple. It is whether the applicant is bound by her act "in good faith' of parting with possession of the property and allowing the first respondent to take occupation thereof prior to and pending transfer.

It is quite clear to me that she is. She is bound not because she waived any rights to retain possession of the property pending transfer as contended by the first respondent,

but, because she agreed to a variation of the term of the agreement regulating occupation to her prejudice.

Generally speaking, the law does not restrict the parties' power to vary their own contract. In keeping with the notion of freedom of contract, the parties are at liberty to change their minds as many times as it suits them as long as at each time that they do so, they are acting in concert and their minds meet. The law will only restrict the parties power to vary their own contract where the parties themselves have in the contract, restricted their own power to do so by inserting a non-variation clause. Typically, a non variation clause provides that no subsequent agreement between the parties shall be valid and binding as between the parties unless it is reduced to writing and signed by both parties.

I note that the parties before me did not seek to protect themselves against variations to the terms of the agreement by inserting a non variation clause in the agreement. Thus, their power to vary the agreement remained unlimited. The only issue that arises is whether the parties' minds met as regards the variation.

The applicant has sought to argue that she did not intend to part with possession before transfer but acted out of good faith and in the belief that Dr Mushonga would come through with the balance of the purchase price.

In my view, it maters not that the applicant viewed her conduct in parting with possession prior to the agreed date as an indulgence on her part. However, that mental reservation was not communicated to the first respondent. What was communicated to the first respondent and accepted by it was that occupation would no longer await transfer as per the written agreement. Occupation was coming sooner as per the new arrangement between the parties.

It is a trite principle of the law of contract that where by word or deed, one party to a contract gives out to the other a certain position and that position is accepted, both parties are bound. This is referred to a the quasi- mutual assent doctrine which is an intrinsic part of objectively establishing consensus ad idem between the parties to a contract.

In this regard, I can do no better than refer to the words of GOLDIN J in *Musgrove & Watson (Rhod) (pvt) Ltd v Rotta* 1978 (2) SA 918 (R) at 922 E-G where he had the following to say:

"There are cases in which a contract is treated as having come into existence notwithstanding that one party's conduct conflicts with his real intention. (*I Pieters & Co v Salomon* 1911 AD 121 at 137; *Levy v Banket Holdings (Pvt) Ltd* 1956 (3) SA 558 (FC) at 561 - 3; *Collen v Rietfontein Engineering Works* 1948 (1) SA 413 (A).) This type of contract is sometimes called "quasi-mutual assent" (Wille and Millin Mercantile Law of South Africa 16th ed at 17; Lee Introduction to Roman-Dutch Law at 220; *Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 at 422.) It has also been described as "the objective theory of contract" (Williston on Contracts revised ed vol 1 para 98, and *Peri-Urban Areas Health Board v Breet NO and Another* 1958 (3) SA 783 (T) at 789 - 90)."

The doctrine of quasi mutual assent has been a part of our contract law from time immemorial and it is on its application that the applicant is bound by the variation in the terms of the agreement.

Mr Mangwengwende has strenuously argued that the applicant was indulging the first respondent in allowing her to take occupation of the property prior to the date of transfer. He proceeded to submit that since this was an indulgence, it could be withdrawn at any time as the agreement between the parties provided that any indulgencies or extensions of time which one party may grant to the other in respect of the performance of that other party's obligation under the agreement would not prejudice the party granting the indulgence.

It is common cause that all the purchaser's obligations under the agreement relating to the payment of the purchase price were delegated to Dr Mushonga. The first respondent remained with no obligations to perform under the contract for the delegation of its obligations with the consent of the applicant acted as a novation of the original agreement of sale and divested the first respondent of its obligations and vested and burdened Dr Mushonga with everything that remained to be performed under the contract. (See *S Ltd v Commissioner of Taxes* 1984 (1) ZLR 290 (SC)). In my view, it follows that if there were any indulgencies to be granted in the performance of the contract, such indulgencies could only have been for the benefit of Dr Mushonga and not the respondent. The creation of the new relationship between the applicant and Dr Mushonga, while not terminating the original contract between the applicant and the first respondent, had the effect of removing the respondent from the contractual equation as far as performance under the contract was concerned. In other words, if there were to be any extensions granted by the applicant, these could only have been granted to Dr Mushonga who still carried the burden performance under the contract.

It is therefore my finding that the granting of occupation of the property to the first respondent by the applicant at the inception of the agreement of sale was not an indulgence as envisioned in clause 12 of the agreement of sale.

Ms Matimati sought to argue that the applicant waived her right to retain the premises until the date of transfer by allowing the respondent occupation of same prior to that date. In my view, waiver is not the correct legal principle applicable in this matter. Waiver is usually pleaded as a defence to an alleged breach of a term of a contract. In that regard, the party alleging waiver will be trying to stop the other party from relying on the breach on the basis that the right to do so has been waived or abandoned.

In *casu,* the applicant is not alleging breach of the agreement by the first respondent at all. In fact, the applicant correctly in my view accepts that the first respondent has no obligations under the contract and so cannot be in breach of any term of the contract. I understand the applicant to be somewhat alleging ownership of the property which she seeks to vindicate from the first respondent on the basis that the invitation she extended to the respondent to occupy the property prior to transfer has now been withdrawn.

I may have found merit in the applicant's argument had I not found that the parties varied the agreement of sale as to the date of occupation of the sold property.

In the result, I make the following order:

The application is dismissed with costs.

Ziumbe & Mtambanengwe, applicant's legal practitioners.
Dube, Manikai & Hwacha, first respondent's legal practitioners.