EVERSON ZHOU
versus
SALTANA ENTERPRISES (PVT) LIMITED
and
DAVIE FUKWA MUTINGWENDE
and
ANTHONY ERNEST PAHWARINGIRA
and
MEMORY GAHADZIKWA

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 10 October and 3 November, 2016

Opposed application

N Mahori, for the applicant
E T Moyo, for the respondent

MANGOTA J: On 7 September, 2006 the applicant purchased stand number 7895 Belvedere West, Harare from the first respondent. He paid Z$3 991 650 for the same.

In October, 2015 the applicant discovered that the stand which the first respondent sold to him had been taken occupation of by the fourth respondent. The latter had engaged someone to clear the stand of any rubble or vegetation. On further investigation of the matter, it turned out that the second respondent has sold the stand to the fourth respondent.

The applicant filed an urgent chamber application. He moved the court to interdict the respondents, the fourth respondent in particular, or anyone acting on their instructions from occupying, developing or otherwise dealing with the stand.

The first and second respondents opposed the urgent chamber application. The third respondent supported the applicant's position. The fourth respondent remained uncommitted and, therefore, neutral.

Notwithstanding the spirited opposition which the first and the second respondents mounted, the application culminated in a consent provisional order which Musakwa J entered on 11 November, 2015.

It was during the hearing of the urgent chamber application that the fifth respondent pitched up at court. He successfully applied for his joinder to the proceedings.

The fifth respondent, the papers revealed, had purchased the same stand from the first respondent. He did so on 26 July, 2002. He paid Z$1 318 125 for the same.

The fifth respondent filed his opposing papers on 7 December, 2015. He, on the same date, filed a counter application in which he moved the court to:

(i) dismiss the applicant's claim;

(ii) declare him the rightful purchaser and holder of rights, title and interests in the stand.

(iii) interdict the respondents from occupying, possessing or selling the stand or otherwise interfere with his possession of the same;

(iv) evict from the stand any person (s) who would have occupied the stand.

The applicant filed his Heads on 27 June, 2016. He did so in anticipation of the return day. He served the same on the respondents during the period 27-29, June, 2016.

The fifth respondent filed his Heads on 4 July, 2016. He served the same upon the applicant and the first to fourth respondents on 5 July, 2016.

The first, second, third and fourth respondents did not file their Heads with the court. They were, therefore, barred and were, for purposes of the present matter, out of court.

The applicant had, and still has, the fifth respondent to content with. The latter put up a very spirited fight for his rights in the stand.

It was common cause that the applicant did not assert his rights to the stand from 2006 to 2015. It was also common cause that the fifth respondent did not assert his rights to the stand from 2002 to 2015. Both claimed that they waited for the first respondent, the seller, to service the land on which the stand stood.

There was no doubt that the applicant and the fifth respondent had, and have, competing claims on the stand. It was also clear that, until the fifth respondent came onto the scene to contest his entitlement to the stand, the applicant was unaware of the fifth respondent's interest in the same. It was equally clear that, until the fifth respondent became aware of the applicant's urgent chamber application, he was not aware of the applicant's interests in the stand. Both of them appeared to have been innocent purchasers to whom the first respondent sold one and the same stand at different times.

The first sale which related to the fifth respondent was concluded in 2002. The second sale related to the applicant. This was concluded four years later (i.e. in 2006).

It was on the basis of the above observed matters that the court invited counsel for the parties to file supplementary Heads. It directed counsel to articulate the challenges at hand and to profer a way forward on the same.

The court remained thoroughly indebted to counsel for the research as well as very good work which came out of its directive. The supplementary Heads were of very high quality. They were extremely relevant to the parties' case as well as cause.

The law which relates to two or more competing claims by purchasers of one property had a fair share of debate amongst academic writers and the judiciary. G.A Mulligan, for instance, wrote on the subject matter in the 1948 SALJ 564 at p 577 as follows:

> "There is no compelling or persuasive equality favouring the first purchaser. Both purchasers acquire *jura in personam,* they have similar claims against the seller(s), they are equally innocent, and equally wronged, save that there may be special circumstances ….which make the burden upon the one heavier than upon the other. The mere fact that the first purchase takes place before the second purchase does not, in itself, make the first purchase more efficacious than the second, i.e it does not give the first purchaser a claim to specific performance stronger than that of the second purchaser." (emphasis added).

MACDONALD J criticised Mulligan's approach to the matter. He remarked in *BP Southern Africa (Pvt) Ltd* v *Desden Properties (Pvt) Ltd and Total Oil Products Rhodesia (Pvt) Ltd*, 1964 RLR 7 at 11 F-G and H-I as follows:

> "I disagree entirely with Mulligan's views….. In my view, the policy of the law to uphold the sanctity of contacts will best be served in the ordinary run of cases by giving effect to the first contract and leaving the second purchaser to pursue his claim for damages for breach of contract. I do not suggest that this should be the invariable rule, but I agree with the view expressed by Professor McKerron that, save in special circumstances, the first purchaser is to be preferred." (emphasis added).

The *Desden Properties* case stressed the need on the part of the court to, in general, acknowledge, accept and uphold the sanctity of contracts principle. The qualification which the learned judge was pleased to make saved to state the obvious. The obvious is that, where special circumstances exist justifying a departure from upholding the principle of sanctity of contracts, the position of the second purchaser would prevail over that of the first purchaser.

Mulligan's views were, in the court's opinion, a restatement of what CURLEWS J, stated in *Hotgaard* v *The Registrar of Mining Rights* 1908 TS 680. The learned judge debated the subject matter which this court is currently seized with and stated that:

> "….. it is a principle which this court recognises that where two innocent persons have to suffer, if both these parties have a right of action or a claim against a third

> person, the court should endeavour, if there is to be any hardship, so to order that the person who is likely to be most damaged should be assisted…." (emphasis added)

In *Le Roux* v *Odendaal and Ors*, 1954 (4) SA 432 BROOME JP, accepted the following statement by Professor McKerron as correctly stating the test to be applied:

> "where transfer has been passed to neither, B (the first purchaser), in the absence of special circumstances affecting the balance of equities, can interdict A from passing transfer to C and obtain specific performance of the contract, and in that event C's only remedy is in an action for damages against A." (emphasis added)

A common thread runs through the judicial pronouncements which the court had occasion to examine as read together with the learned authors' statements. The thread is that, whilst the principle of the sanctity of contracts must, at all times, be generally observed and upheld by the courts, the principle may be departed from where the balance of equities favours the second, to the first, purchaser.

In casu, the fifth respondent's contract existed prior to that of the applicant. He purchased the stand in 2002. He, however, did nothing to assert his rights to the stand for twelve (12) years running. He only came on board when his attention was drawn to the urgent chamber application. The attention was not as a result of his own unaided effort. He said the judicial manager wrote drawing his attention to the application. He paid virtually nothing for the stand other than the purchase price which he paid to the first respondent in 2002. He, in the court's view, acted unreasonably in not taking timeous steps to protect his position in the stand.

The fifth respondent's claim should be measured against that of the applicant. The applicant was invited to, and he did, pay $2 500.00 towards the servicing of the stand. He also paid levies and rates in respect of the stand to the City of Harare. When he realised that his rights in the stand were under threat from the second and the fourth respondents, he wasted no time. He filed the urgent chamber application. He engaged legal representation to prosecute the application. These dealt with all the process which pertained to the application including the first and second respondents' opposition to the same. When he thought that he was done with those and was about to breathe a sigh of relief, the fifth respondent came on to the scene from the blues, as it were. He maintained his position in an unrelenting manner. He paid a very heavy price in the process. No amount of money would adequately compensate him for his effort, energy, time and money which he spent with a view to retaining the stand. The frustrations which he endured at the hands of the second respondent,

Davie Fukwa Mutingwende, was immeasurable. He suffered more hardship in his effort to assert his right to what he considered was his than the fifth responded did.

What the applicant endured at the hands of all the respondents, except Memory Gahadzikwa, did certainly tilt the balance of equities in his favour. The scales of justice operated more for him than they did for the firth respondent.

The court remained alive to the fact that the first respondent was under judicial management when the applicant purchased the stand. However, evidence which was led showed that the stand was not under the jurisdiction of the provisional judicial manager when the applicant purchased it. It was under the purview of the shareholders of the first respondent. The letter which the directors of the first respondent addressed to the provisional judicial manager on 17 July, 2006 clarified the position of the stand to the satisfaction of the court.

It was evident, from the stated fact, that the sale of the stand to the applicant was proper. The applicant did all what was in his capacity to protect his interests in the stand. He was embroiled in lengthy litigation with a view to retaining the stand. He was, in the words of CURLEWS J "the person who was likely to be most damaged" and in Mulligan's words "the person whose burden was heavier than that of the other". The court should, therefore, lean in his favour and assist him for his unwavering effort.

At the centre of all what took place was the first respondent and its director one Davie Fukwa Mutingwende. These duped unsuspecting purchasers. They concluded with the purchasers multiple sales of one and the same stand. Three purchasers parted with their hard earned money as a result of the conduct of the first respondent and Mr Mutingwende. Had these conducted themselves in a candid and honest manner, the present application would not have been necessary. They put everyone to unnecessary expense. They also wasted the court's time in the process.

The fifth respondent was only but trying his luck when he successfully applied for joinder. Unfortunately for him, however, his luck left him as soon as he had caught up with it.

The court will, not unnaturally, express its displeasure against the first respondent and its director Mr Mutingwende. These will be ordered to pay the costs of this application as well as the costs of the fifth respondent's counter-application on a higher scale.

The court has considered all the circumstances of this case. It is satisfied that the applicant proved his case on a balance of probabilities. It, accordingly, orders as follows:

1. That the fifth respondent's counter application be and is hereby dismissed.

2. That the applicant be and is hereby declared the owner of stand No. 7895 Belvedere West, Harare.
3. That the respondents be and are hereby interdicted from interfering with the applicant's ownership, occupation or possession of stand No. 7895 Belvedere West, Harare.
4. That the first respondent and its Director Davie Fukwa Mutingwende pay, jointly and severally the one paying the other to be absolved, costs of the application and the counter application on an higher scale.

Machinga & Partners, applicant's legal practitioners
Makiya & Partners, 1st respondent's legal practitioners
Davie Fukwa Mutingwende, 2nd respondent legal practitioners
Rubaya and Chatambudza, 3rd respondent's legal practitioners