DIOGENES-ALEXANDER CHAUKE
(Represented by MAHLOMULO CHAUKE,
in his capacity as father and natural guardian)
versus
ESTRELAC INVESTMENTS (PVT) LTD
and
TREDCOR ZIMBABWE (PVT) LTD
and
REGISTRAR OF DEEDS BULAWAYO N.O

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 16 May 2017 & 31 May 2017

Opposed application

H Tererai, for the applicant
Mrs *C Pasipamire,* for the 2nd respondent

MUREMBA J: This is an application for the transfer of Stand number 979 Dulibadzimu, Beitbridge held under Deed of Transfer No. 895/2010 from the first respondent to the applicant and for the second respondent to be ordered to uplift the caveat it had placed on the said property.

The applicant being a minor, his founding affidavit was deposed to by Mahlomulo Chauke, in his capacity as father and natural guardian of the applicant. It is averred that on 25 March 2014, the Applicant entered into an agreement of sale with the first respondent for the sale of stand number 979 Dulibadzimu, Beitbridge. The applicant was purchasing the property from the first respondent. The purchase price was US$26 000-00 which was paid in cash upon the signing of the agreement of sale. The first respondent surrendered to the applicant's legal practitioners the original deed of transfer and the endorsed Deed of Grant together with a power of attorney to pass transfer. On 26 March 2014, the applicant's conveyancers tried to pay the capital gains tax to ZIMRA in the sum of US$1 300.00 but ZIMRA demanded US$2 100-00. Thereafter several correspondences and appeals were made to ZIMRA in a bid to have the tax reduced, but they were not fruitful. The applicant ended up

paying the tax as demanded by ZIMRA on 12 June 2015. After payment of the capital gains tax and having had the rates cleared, the applicant's legal practitioners sought to transfer the property to the applicant only to find a caveat having been placed on the property by the second respondent. This was pursuant to a judgment the second respondent had obtained against the first respondent on 26 March 2014. The applicant's legal practitioners wrote to the legal practitioners of the second respondent and to the third respondent to have the caveat lifted, to no avail. It is further averred that since the applicant bought the property before issuance of the writ of execution and before the time of attachment, the applicant was already entitled to the property.

Despite being served with the court application the first respondent did not file any papers in response. The second respondent opposed the application.

The opposing affidavit of the second respondent was deposed to by its company secretary. It is averred that on or about 19 February 2014 the second respondent filed an application for default judgement in this court, in a matter between itself and the first respondent under case number 10443/2013. The first respondent did not at any point indicate that the property in question was sold to anyone. A default judgment was granted on 26 March 20014 and pursuant to that a writ of execution was issued on 23 May 2014. The second respondent also avers that even though the applicant claims to have purchased this property, there is no evidence of payment of the purchase price. It further averred that the property in question is in the process of being sold in execution of the first respondent's debt to it. The second respondent averred that even where a third party has a personal right against a judgment debtor, the judgment creditor is entitled to have the property sold as the placing of a caveat results in a judicial lien attached to the property in favour of the judgment creditor and such is the scenario in the present matter.

The applicant filed his answering affidavit in which it is averred that the first respondent was only served with the writ of execution on 29 July 2014, but the property had already been sold on the 25 of March 2014. Furthermore, it averred that the purchase price was paid in full on signing the agreement of sale. The applicant also averred that the second respondent was at law supposed to have notified through publication in the Gazette and any other local newspaper, before proceeding to attach the property. He also averred that he delayed transfer of this property due to ZIMRA's tax demands and this was beyond his control. He further averred that the caveat was therefore erroneously placed, and as such it should be uplifted.

What is clear from the narration of events given by the two parties is that by the time the first respondent entered into the sale agreement with the applicant on 25 March 2014, the second respondent had already issued summons against it in HC 10443/13. The first respondent must have been aware of the summons because the return of service shows that the summons was served at its premises on 9 December 2013.

It is a fact that the applicant and the first respondent entered into the sale agreement a day before the second respondent obtained the default judgment against the first respondent. It is highly probable that the first respondent entered into the sale agreement with the applicant with the intention of defeating the satisfaction of any judgments which could be granted against it in respect of the debts it owed to the second respondent. In the absence of evidence to the contrary, I will take it that the applicant purchased the property or entered into the sale agreement *bona fide* without acting in connivance with the first respondent.

What is apparent is that at the time the applicant was busy dealing with the issue of the payment of the capital gains tax with ZIMRA, the second respondent which had obtained a default judgment was also trying to enforce the judgment. That is the very time it had a writ issued and had a caveat placed on the same property the applicant had bought. So the applicant and the second respondent were engaged in different actions in respect of the same property oblivious of what the other party was doing. There is nothing to show that each party was aware of what the other party was doing. In the end the second respondent successfully placed a caveat on the property after the property had been sold to the applicant but before the applicant had taken transfer thereof. Put differently, ownership of the property had not been transferred to the applicant when the second defendant placed the caveat on it.

An agreement of sale does not confer ownership rights to the purchaser as the applicant's counsel initially sought to argue in his heads of argument. As he later conceded in his supplementary heads of argument and during the hearing, ownership rights are conferred by transfer and registration of title with the office of the third respondent, the Registrar of Deeds. In *Takafuma* v *Takafuma* 1994 (2) ZLR 103 (5) 105 H, 106 A it was held that:

> "The registration of rights in immovable property in terms of the Deeds Registries Act [*Chapter 139*] is not a mere matter of form. Nor is it simply a device to confound creditors or the tax authorities. It is a matter of substance. It conveys real rights upon those in whose name the property is registered. See the definition of 'real right' in s 20 of the Act. The real right of ownership, or *jus inre propria,* is the sum total of all possible rights in a thing – see *Willies Principles of South African Law* 8 ed p 255." (My emphasis)

In *Moyo* v *Fraser and Others* SC 5/2006 the Supreme Court quoted with approval the dicta in *Harris v Trustee of Buissinne* (1850) 2 Menzie. In that case the plaintiff entered into a contract of sale with Buissinne in terms of which he bought Buissinne's house for $1 050 400-00 which was to be paid in cash and for the balance of $650-00 the plaintiff was to pass a mortgage bond in favour of a Savings Bank. The plaintiff paid $1 050 400-00 and took possession of the house on the same date. Subsequently, Buissinne failed to give the plaintiff transfer of the house for him to execute the mortgage bond. The plaintiff sued Buissinne praying for an order compelling Buissinne to give him transfer of the house. Upon being sued Buissinne surrendered his estate as insolvent and it was placed under sequestration. The trustee of the insolvent estate pleaded that he was not liable to give transfer to the plaintiff. Giving judgment for the trustee of the insolvent estate the court said at pp 107 – 108:

> "By the law of Holland, the *dominium or jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and this species of transfer is as essential to divest the seller of and invest the buyer with the *dominium or jus in re* of 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. Consequently, the agreement of sale between Harris and Buissinne and the delivery of the possession of the house by Buissinne to Harris, gave Harris nothing more than a *jus ad rem* and a personal claim against Buissinne to convey the jus in re to him by transfer *coram lege loci.* The position of a purchaser of land who paid the purchase price but had not received transfer of the property at the date of sequestration of the seller's estate is that he had no right at common law to the transfer of the land. The purchaser is not entitled to prevent the trustee in an insolvent estate from transferring the property to a third party if that is in the best interests of creditors. *Ex parte Singleton* 1963 R & N 1." (My underlining)

It follows by parity of reasoning that the applicant in the present matter had not yet obtained real rights at the time the second respondent placed a caveat on the property. What the applicant acquired by entering into an agreement of sale with the first respondent are personal rights which he cannot enforce against the whole world but against the first respondent alone. In *Civil Practice and Procedure of the Superior Courts* in South Africa 3rd ed at p 596, Herbstein and Van Winsen stated that;

> "…… a judgment creditor is entitled to attach and have sold in execution the property of his debtor notwithstanding that a third party has a personal right against such a debtor to the ownership or possession of such property which right arose prior to the attachment or even the judgment creditor had notice when the attachment was made. An attachment in execution acts as a judicial mortgage or *pignus judiciali*."

The applicant's claim for transfer on the basis of ownership is not sustainable at law. The applicant acquired personal rights through the agreement of sale that he entered into. On the other hand, the second respondent acquired personal rights through the caveat it placed on the property. With the two parties having both acquired personal rights, the applicant's

application can only succeed if he can show the existence of special circumstances justifying an order for the upliftment of the caveat. See *Maphosa and Another* v *Cook and Others* 1997 (2) ZLR 314 (H) wherein the judge said at p 317;

> "It is clear from the authorities that in the exercise of its discretion the court will consider the fact that the attached property had been sold to the applicant, but that the applicant must show, in addition to that factor, the existence of facts or circumstances with satisfy it that it would be just or equitable to grant the relief sought."

See also *Moyo v Muwandi* SC 47/03 and *Deputy Sheriff v Moyo and Another* HH 640/15 which cases dealt with interpleader proceedings. It was held that a judgment creditor has the right to have attached and sold in execution property registered in the name of the judgment debtor. However, if the claimant can show that there are special circumstances warranting the setting aside of the sale in execution the court can set aside the sale in execution. Likewise if the applicant in the present matter can show that there are special circumstances warranting the upliftment of the caveat I will grant the order.

The applicant's counsel in his supplementary heads of argument submitted that there are special circumstances warranting the removal of the caveat. He said that the sale agreement was entered into before the placement of the caveat and as such in terms of ranking the applicant's personal rights rank higher than those of the second respondent. That argument was shot down by the second respondent's counsel who argued that there is no ranking of personal rights. I am in agreement with her. Personal rights have no ranking. It is just a matter of which party enforced its personal rights ahead of the other and in *casu* it was the second respondent. As I have already said above, the applicant and the second respondent were engaged in different actions with regards to the property in dispute oblivious of what the other party was doing. Both of them were acting in good faith unaware of what the first respondent was up to, but the end result was that each one ended up acquiring personal rights over the same property albeit on different dates. The fact that the applicant paid the purchase price, cleared all rates, paid transfer fees, took vacant possession of the property and only failed to effect transfer because of the dispute on the amount of capital gains tax payable to ZIMRA does not amount to a special circumstance warranting preferential treatment of the applicant's personal rights over those of the second respondent. It remains a fact that the second respondent enforced its rights first ahead of the applicant. No special circumstances have been advanced by the applicant to show that his personal rights should prevail over those of the second respondent thereby warranting the upliftment of the caveat. The applicant failed to show that he has greater rights than the second respondent both of them having been

duped by the first respondent which wanted to benefit from the sale of the property and at the same time avoid its liability to the second respondent.

In the result, the application is dismissed with costs.

Tererai Legal Practice, applicant's legal practitioners
Scanlen & Holderness, second respondent's legal practitioners