HILLARY MURIMA
and
FRANCISCA BOIKETHO RUGARE MURIMA
versus
JANE LINDA GEORGIAS
(in her capacity as the Executrix Dative of the
Estate Late Aguy Clement Georgias) N.O
and
THE MASTER OF THE HIGH COURT
and
THE REGISTRAR OF DEEDS N.O

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 27 March 2019 & 22 May 2019

Opposed Matter

E Mubaiwa, for the applicant
D Drury, 1st for the respondent

MATANDA-MOYO J: This is a court application to compel transfer of an immovable property.

The brief facts are that applicants on 2 February 2017 purchased a certain piece of property namely Remaining Extent of Lot 52 Meyrick Park of Mabelreign measuring 8035 square metres from the first respondent. The purchase price was US$150 000.00. Such amount was deposited into the trust account of Messrs Gill Godlonton and Gerrans Legal Practitioners. On 15 June 2017 the second respondent consented to the sale.

Some dispute arose around August 2018 where upon a purported beneficiary tried to stop the sale. The issue was later resolved by the second respondent. The applicants at that point purportedly withdrew the deposit from the Lawyers Trust Account. The dispute amongst the

beneficiaries was later resolved by the Master who then directed that the sale may proceed. Applicants purportedly redeposited the $150 000.00 back into Gill Godlonton and Gerrans Trust Account.

Later the first respondent indicated she was no longer proceeding with the sale prompting this application.

Applicants submitted that they complied with the conditions of the sale and prayed that first respondent be compelled to do all things as are necessary to effect the transfer.

First respondent opposed the granting of the order sought in the basis that the applicants have failed to prove the terms of the contract and have also failed to prove compliance with such terms of the contract. It is the first respondent contention that the sale price of US$150 000.00 was not paid into the trust account of Messrs Gill Godlonton & Gerrans on 2 February 2017. First respondent submitted that the initial payment done was withdrawn following a dispute concerning the sale. When Anthony Georgias approached the High Court challenging the sale, first respondent was advised that the applicants had unilaterally withdrawn their deposit. According to first respondent the sale agreement was terminate at that stage. First respondent submitted that the sale agreement was repudiated, lapsed or fell away.

Secondly first respondent contended that the sale agreement was flawed as it was entered into without the consent of the second respondent. Let me hasten to say I found no merit in this submission as the Master's consent was subsequently granted.

First respondent insisted there was no compliance with the terms and conditions of the original sale agreement. First respondent moved for the dismissal of the application.

The parties agreed that they entered into a contract for the sale of the property in question. It is also not in dispute that the second respondent consented to such sale. Once those requirements were satisfied the sale was valid and enforceable. It is also not disputed that the applicants, after the signing the agreement caused the sale amount to be deposited into the trust account of Gill Godlonton & Gerrans. At some point Anthony Georgias did approach the High Court challenging the sale. Subsequent to that on 26 October 2017 the first applicant wrote to Gill Godlonton & Gerrans advising them to return their purchase price by depositing same into applicants Standard Account number 8700209674401. The applicants in the same letter undertook to return the funds to the lawyers trust account once the dispute to the Georgias Estate was resolved. First respondent

submitted that when she learnt that the purchase amount had been withdrawn from the lawyers, the sale was repudiated.

The issue to be resolved by the court is whether the purported temporary withdrawal of the purchase amount from the lawyers trust account by the applicants constituted a breach of the sale agreement.

In terms of the Agreement of sale under "Special Conditions of Sale" the parties agreed as follows:

> "This sale is subject to the following special conditions and general conditions and if there shall be any special conditions applicable to the sale which differ in any respect from such general conditions, such special conditions shall prevail.
>
> (a) On signing the Agreement of sale the purchaser shall pay the full purchase price of US$150 000.00 (one hundred and fifty thousand United States Dollars) into Messrs Gill, Godlonton and Gerrans Legal Practitioners' trust account.
>
> (b) …….
>
> (c) The sale is subject to the consent of the Master of the High Court of Zimbabwe."

The applicants in terms of the agreement were to deposit the $150 000.00 into the trust account of Gill, Godlonton and Gerrans which they initially did. When the applicants transferred the purchase price from the trust account of Gill, Godlonton and Gerrans they committed a material breach of the agreement.

Specific performance is an equitable remedy in the law of contract where a court orders a party to perform a special act, such as to give effect to a contract where the other party has satisfied all its requirements in terms of the contract. Specific performance is a rare or unusual remedy which the court should grant where money compensation is not adequate.

Having regard to the facts of this matter I do not believe this is a case warranting the granting of specific performance. The applicants have already mitigated their loss by withdrawing the purchase money and investing it elsewhere. The applicants have not suffered damages which warrant granting of an order for specific performance. In any case the applicants have failed to show that they complied with the terms of the agreement. Once the respondents raised the possibility that the applicants withdrew the purchase amount from the lawyer's trust account, it was imperative for the applicants to provide proof that such money was never withdrawn. The applicants failed to discharge such onus on them.

The applicants referred me to the case of *Asharia* v *Patel and Ors* 1991 (2) ZLR (5) where GUBBAY CJ said:

> "The general rule is that where the time for performance has not been agreed upon by the parties, performance is due immediately on conclusion of their contract or as soon thereafter is reasonably possible in the circumstances, but the debtor does not fall into *mora ipso factio* if he fails to perform forthwith or within a reasonable time. He must know that he has to perform. This form of *mora*, known *as mora ex persona*, only arises if, after a demand has been made calling upon the debtor to perform by a specified date, he is still in default."

The above case is not applicable in this case as it is clear that in the matter *in casu*, the parties did agree on time limits within which payment of purchase price was to be made. The applicants knew that they had to perform and there was no need of placing them in mora. See also *Smart* v *Rhodesian Machine Tools Ltd* 1950 (1) SA 735 (SR), *Farmers' Co-operative Society (Res)* v *Benny* 1012 AD 343, *Broster* v *Mudhanda and Anor* (2) *Pierce* v *Mudhanda and Anor* SC 5/18.

The applicants have failed to show that they complied with the terms of the sale agreement. Specific performance is only available to parties who themselves have done all they were to do in terms of the agreement. Such parties would seek to have the party in default being forced to undertake what they had agreed to do in terms of the agreement. See *Intercontinental (Pvt) Ltd* v *Nestle Zimbabwe* 1993 (1) ZLR 21 *Kruntel Bro* v *Lazarus* 1992 (2) SA 423.

Specific performance being an equitable remedy, I am of the view that it is not available to a party which has breached the terms of the agreement.

In the result therefore, the applicants having failed to prove that they themselves complied with the terms of the agreement, are not entitled to the remedy sought.

I therefore order as follows:

The applicants' application be and is hereby dismissed with costs.

Mbidzo Muchadehama & Makoni, applicant's legal practitioners
Honey & Blanckenberg, 1st respondent's legal practitioners