WANG ENXIANG

versus

SHI YONGCHUN

and

LI JIAQI

and

NUMBER SEVENTEEN METALLURGICAL

CONSTRUCTION (PRIVATE) LIMITED

and

THE REGISTRAR OF DEEDS NO

HIGH COURT OF HARARE

DUBE J

HARARE, 24 May 2012

*RR Nyapadi*, for the applicant

*S Noor Mohamed*, for the respondents

DUBE J: This is an application for an order compelling the first respondent to deliver title deed number 6563/99 and all other supporting documents and for third respondent to facilitate transfer of stand 321 Willowvale Township Harare (“the stand”) to him.

Sometime in April 2009 the applicant purchased the stand from the first respondent. The first respondent had earlier purchased it from the third respondent in the year 2007.The first respondent subsequently sold the stand to the second respondent. After the sale, no transfer of the property was effected and the stand is still registered in the name of the third respondent. The title deeds to the stand are in the possession of the first respondent. The applicant has placed a caveat over the stand.

The applicant states that the first respondent and him were friends. That on 2 April 2009, his wife through a power of attorney granted to her by him purchased the stand from the first respondent and paid the full purchase price of the stand being two hundred and eighty thousand Chinese Yuan (CHY 280 000-00). In the year 2009 the applicant left for China. He claims that he left the first respondent with the title deeds and that he did this for his security and he had first respondent acknowledge that he borrowed the title deeds from him. The applicant states that the first respondent held the title deeds and all relevant documents pertaining to the stand in trust for him and for his security. Mr *Nyapadi* who represented the applicant submitted that the sale was not a verbal agreement nor was it an instalment sale. He submitted that the papers available show that the purchase price for the stand was CHY 280 000-00 and that this fact is supported by the cash receipt produced which he argued is proof that the respondent paid the full purchase prize. The applicant admits that the first respondent has offered to reimburse the money he paid as the purchase price but contends that this was not because he failed to fulfil his obligations. The applicant states that despite repeated demand the respondent has failed and refused to hand over the title deeds to the applicant.

The first respondent opposed the application. He admits that he sold the stand to the applicant but avers that the purchase price was CHY360 000-00. He claims that the applicant has not fulfilled the terms of the agreement of sale as he paid only 280 00 0-00 Yuan and has failed to pay the full purchase price leaving an outstanding balance of 80 000-00 Chinese Yuan. He admits that he is in possession of the title deeds to the stand. He avers that sometime in 2009, the applicant told him that his business was bad and that he could not manage to pay him the balance of the purchase price. He states that the applicant voluntarily handed over to him the title deeds after he failed to pay fully for the stand. That the applicant consented to the first respondent refunding him the total sum of CHY280 000-00 after he resold the stand. He contended that the applicant cannot claim specific performance when he has not discharged his contractual obligations. He further submitted that the agreement of sale was verbal and was subsequently cancelled after the applicant failed to pay the full purchase price. He maintains that after the cancellation of the agreement, the applicant returned voluntarily all the documents including the title deeds to him in order that he could resell the stand and repay him his CHY280 000-00.

The first respondent asserts that there are serious disputes of fact existing on the papers which cannot be resolved on the papers and need the leading oral evidence. The first respondent urged the court to dismiss the application. Mr *Mohammed* who represented the respondents submitted that the agreement was a verbal agreement of sale and that as a result the exact terms of the contract is unknown resulting in each party providing a different version thereby creating a dispute of fact. He argued that there is a dispute over the agreed price of the stand. That whilst the first respondent avers that the applicant has not fulfilled its contractual obligations, the applicant claims that he has paid the full purchase prize for the stand. The other dispute is as regards the basis upon which the first respondent possesses the title deeds. He submitted that there are three versions of the first respondent’s possession of the title deeds. The first version he said, is the applicant’s claim that the first respondent retained the deeds after the sale. The other version he said, is that the first respondent borrowed the title deeds. The respondent’s position is that he was voluntarily given the title deeds in order to resell the stand. The first respondent denies that he borrowed the title deeds and states that there is no reason why he would borrow the title deeds if he had sold the stand. He maintained that the title deeds were returned to him voluntarily.

The first issue that this court has to deal with is whether or not there exists on the papers material disputes of fact which cannot be resolved on the papers. The approach to be adopted by the court is outlined in Herbstein & Van Winsen, *The Civil Practice of the Superior* *Courts of South Africa* 3rd ed at the foot of p 61 where the learned authors state that:

”Courts will only order that a matter brought by way of motion proceedings be dealt with by way of trial proceeding or be dismissed if there is a real dispute of fact between the parties”.

The onus is on the first respondent to show that a real dispute of fact exists on the papers.

There are a number of documents which were produced by the applicant in favour of its case. I am going to adopt a robust approach and resolve this matter on the basis of the papers available and the documents filed in this matter.

 A cash receipt dated 2 April 2009 and in Chinese was attached to the papers and so was an English version. The interpretation to Chinese was done at the Chinese Embassy and reads as follows:

“I, Shi Yong Chun, received RMB 280 000-00 (Two hundred and fifty thousand Yuan) from Mr Wang EN Xiang, being the payment in full for the proceeds of sales of my property.”

The receipt states that that CHY 280 000-00 was paid by the applicant in full payment of the purchase price for the stand. The first respondent challenges the interpretation on the basis that it is vague and that it does not describe the property sold, thus whether it is movable or immovable. He also challenged the authenticity and validity of the interpretation of the cash receipt. He did not give further details of that challenge. The first respondent sought to challenge the signature on this document in court. This challenge was not raised in its opposing affidavit. Mr *Nyapadi* submitted that Mr *Mohammed* had asked his client about the signature and that this client confirmed that the signature on the cash receipt was his. Mr *Mohammed* did not challenge this assertion.

 The first respondent does not challenge the Chinese versions attached but the interpretations. He has not proffered his own versions. The interpretation of these documents was done by the Chinese Embassy and there are seals to show the authenticity of the interpretations. This court cannot imagine any other person or authority in this country that may be best placed to carry out Chinese interpretations. The court is satisfied that all the interpretations are authentic. Although the cash receipt does not mention the property in issue, I have no doubt in my mind that the receipt pertains to the stand in issue and that the stand was sold for CHY280 000-00. The receipt shows that it was given by the first respondent acknowledging receipt of the CHY280 000-00 which he admits receiving. He has challenged that receipt on the basis that it does not describe the stand in issue but has not denied that he authored or prepared the receipt. The receipt proves that the purchase price of the stand is CHY 280 000-00.

Although the first respondent avers that the agreement was verbal, there is a sales agreement that forms part of the record. It describes the stand and date of agreement of sale is 26 January2007. The sale price is given as USD25 000-00. That seems to me to have been the US dollar equivalent of the purchase prize. No issue was raised regarding that figure. The agreement headed “Purchase and Sales Agreement’’ relates to stand number 321 Willowvale Township. This is the stand in issue. The agreement provides that the seller will provide the purchaser with title deeds and other documents. The document is in Chinese and has an English interpretation available. Although the respondents contended that there is a verbal agreement over the sale of the stand, the terms of the verbal agreement of sale alluded to by the respondents are not known except for the price of the stand. The respondents did not seriously challenge this agreement of sale. Nothing is said about the agreement of sale in its opposing affidavit. The respondent’s defence is a bare denial. There is no doubt in my mind that there is an agreement of sale over the sale of the stand in issue. There is no need for oral evidence on this point.

The next document is an “IOU” document prepared and signed by the first respondent. The first respondent acknowledges in that document, that he borrowed title deeds and other documents pertaining to the stand. It is dated 3 July 2009 and is in Chinese. It reads as follows:

“I Shi Yong Chun borrowed the following original documents for stand number 32121 Willowvale Township from you;”

 and his signature is appended thereto. The documents borrowed are listed and include the title deeds in issue. The document is signed by the first respondent. This document shows that the first respondent borrowed the title deeds and other documents relating to stand number 325 Willowvale Township. No explanation was given as to why the first respondent would acknowledge that he borrowed the title deeds if they were voluntarily given to him. I am not satisfied that there is a dispute which cannot be resolved on the papers. The acknowledgement fully explains the first respondent’s possession of the title deeds and other documents.

The three documents reveal the purchase price, the contents of the agreement of sale and the fact that the first respondent borrowed the title deeds. The documents confirm the applicant’s story.

 The first respondent asserts that the verbal agreement of sale was cancelled. He omits to give details pertaining to how the agreement of sale was cancelled and when and how it was cancelled. There is nothing to show that the cancellation if any was communicated to the applicant. There is utterly no proof to support the first respondent’s story that the contract of sale was subsequently cancelled.

Having examined the evidence that is available, I am not satisfied of the existence of any disputes that are incapable of resolution on the papers.

The applicant breached the terms of the contract of sale it entered into with applicant. The applicant claims specific performance. The stand is still available although it was sold to a third party. It is legally competent to effect transfer to the applicant in these circumstances. The first respondent has not been able to show that the contract is not capable of performance or why an order for specific performance should not be made against it. The applicant complied with the terms of the agreement by paying the full purchase price. There is no reason why an order for specific performance should not be made in his favour.

In the result, it is ordered as follows:

1. The first respondent be and is hereby ordered to deliver to the applicant title deed number 6563/99 registered in favour of Number Seventeen Metallurgical Construction (Pvt) Ltd within seven days from the date of the granting of this order.
2. The second and third respondents be and are hereby ordered to facilitate transfer of stand number 321 Willowvale Township, Harare to the applicant within seven (7) days from the date of granting of this order.
3. The first respondent bears the costs of suit.

*Muza & Nyapadi*, applicant’s legal practitioners

*Ahmed & Ziyambi*, respondent’s legal practitioners