MARRIAGE COUNSELLING SERVICES
versus
NEWMAN NYONI
and
SHOPE NYONI
and
ZEPHANAT WABATAGORE
and
BOTANY TRADING (PVT) LTD
and
MCW HOLDINGS (PVT) LTD

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE, 19 November 2013, 15 April 2014 and 25 June 2014

Opposed mater

B. Furidzo, for the applicant
D. Zimbodza, for the 1st and 2nd respondents
No appearance for the 3rd, 4th and 5th respondents

TAKUVA J: This is an opposed court application.

The facts are common cause. They are as follows:-

On 8 June 2006 applicant bought Plot 66 Chegutu Country Village from one Cleopas Chitapa. A memorandum of agreement was entered into between the parties. The sale was on a share certificate No. 307 issued by the fourth respondent. On 13 February 2012, some 6 years later the applicant discovered that someone had without its consent erected a small incomplete structure on the plot in question. The applicant approached the third and fourth respondent to find out what was happening. It became apparent that after the applicant had purchased the plot the first and second respondents concluded another sale agreement in respect of the same plot and the third, fourth and fifth respondents issued them with another share certificate.

Subsequently, the applicant's lawyers wrote to the third respondent enquiring about how the first and second respondents had acquired the said plot. The letter appears on p 18 as annexure D. On 28 February 2012, the third and fifth respondents admitted in writing that there was a double sale but acknowledged that the applicant was the "first purchaser" of the

property – see Annexure E on p 20 of the record. On 1 June 2012, the first and second respondents' lawyers Nyawo, Ruzive and Partners wrote to the third and fifth respondents demanding proof of double allocation. The third and fifth respondents had written to the first and second respondents on 14 May 2012 offering them another plot, namely plot 181. In that letter, the first and second respondents' legal practitioners wrote, "should such proof be availed to our clients they will consider your offer on PLOT 181 as per your letter. We trust that with your co-operation, this matter will be amicably resolved". See Annexure F on p 21 of the record.

The third and fifth respondents responded to this letter on 12 June 2012 in the following terms;

> "……..
>
> 1. On 18 January, 2006 Cleopas Chitapa bought the above named plot from Vimbai Bvepfepfe (see Annexure A)
>
> 2. A share certificate was issued in favour of Cleopas Chitapa (see Annexure B).
> 3. On the 8th of June, 2006, Cleopas Chitapa sold the plot to Marriage Counselling Services (See Annexure C).
>
> 4. Marriage Counselling Services was issued with the share certificate attached hereto as Annexure "D". <u>In fact, it is Marriage Counselling Services which dug the well which is at the plot.</u>
>
> We trust that this clarifies the position and that your client will now accept our offer". (My emphasis) see Annexure G on p 23 of the record.

On 5 June, 2012 the applicant's legal practitioners wrote to the first and second respondents inviting them to the foremen's offices to "discuss the matter". They also pointed out that from information they had received from the third and fifth respondents, the first and second respondents had not responded to the letter of the 4th May 2012. See Annexure H on p 24 of the record.

The first and second respondents then changed their lawyers. The new lawyers addressed an undated letter to the fifth respondent in the following terms;

> "…….. We have been presented with your letter dated the 12th of June 2012 regarding the above subject which you wrote to our client's then Legal Practitioners we have noted the contents contained therein.
>
> Our client's instructions are that he is not agreeable to your offer for the following reasons:

1. You no longer have stands that you are offering as your last communication you had with our client where he sought a plot for his colleague and you advised that you no longer have.

2. The conduct you showed regarding the sale of this particular plot has made our client to lose all confidence in your way of doing things, they no longer trust that if you are to allocate them another plot, it will be free from any encumbrances or ownership disputes.

3. Your letter clearly showed your lack of sincerity and organisation. Honestly if you had no fraudulent intent in your dealing you could surely have noted that the plot you wanted to sell, which you eventually sold to our client in 2011 had already been sold in 2006, and you no longer were in the position to sell it as it now be longed to someone else.

4. What we detect is dishonest on your part, and such our client is declining your offer, our client reserves the right to report this matter to the Police.

5. Be that as it may, our clients advised that they in the alternative wants (*sic*) your offices to pay him damages for fraudulent misrepresentation, caused by your non disclosure of the status of the plot at the time of your purported sale.

6. They have instructed us to demand a payment of US$20 00-00 within seven days being:-

   (i) Payment for a plot equivalent to the one in question in the area, which in this case amounts to USD 10 000-00.
   (ii) Payment of USD 10 000-00 being the value of developments effected at the said plot 66, by way of a structure built by our clients.

   The writer is amenable to a discussion on how the issue may be resolved without court recourse" (My emphasis). The letter is Annexure 1 on p 25 of the record.

The applicant's legal practitioners offered to sell the plot to the first and second respondents for USD10 000-00. The first and second respondents agreed to buy it at that price but referred the applicant's legal practitioners to the fifth respondent. See Annexures J and K on pp 27 and 28 respectively. On 9 August 2012, the fifth respondents confirmed their acceptance to purchase plot 66 in writing. Their terms were as follows:-

1. Payment of a deposit of USD 6000-00
2. Balance of USD4000-00 to be paid in 12 monthly instalments commencing on 30 September 2012. See Annexure L on p 29 of the record. On 9 November 2012, the fifth respondent offered by way of guarantee to the applicants two residential stands at Risboro Estates measuring 300 hectares in Chegutu worth USD12 000-

00. The applicants declined that offer in writing on 15 January 2013. The applicants advised the first and second legal practitioners that since the fifth respondent had failed to buy the property by the 31st December 2012. See Annexures M, N and O on pp 30, 31 and 32 respectively.

The first and second respondents mandated JENA PROPERTIES who are estate agents to sell Plot 66 for USD 25000-00. On the mandate to sell from, the property's description is given as "10 acres, 2 roomed cottage, blair toilet, pit well, fenced". See Annexure P on p 33 of the court record.

The issues as perceived by the applicant are:-

(a) Whether the respondents should be interdicted from disposing Plot 66 Chegutu Country Village.
(b) Whether the applicant should be declared the lawful owner of the property
(c) Whether the share certificate in favour of first and second respondents should be cancelled.

The issue according to the first and second respondents is whether the applicant should be declared the lawful owner of the property in question. In my view, this is the fundamental issue *in casu* in that its resolution will automatically determines the other two issues.

The Law

The law regarding double sales is trite. In *Guga* v *Moyo and Ors* 2000(2) ZLR 458 (S) it was held that,

> "Where a seller fraudulently sells immovable property to two purchasers the court has to decide between two innocent buyers. Where transfer has not been passed to either party the basic rule in cases of double sales is that the first purchaser should succeed, in the absence of special circumstances. The first purchaser is treated as having the stronger claim and the second purchaser is left with a claim for damages against the seller."

In *Barros and Another* v *Chimphonda* 1999 (1) ZLR 58 (S) it was held per GUBBAY CJ (as he then was) that;

> "The first buyer in a double sale situation has the stronger legal claim and the onus is on the second buyer to prove special circumstances which rendered it inequitable to apply the maxim *qui prior tempore potior est jure.*"

This maxim means "he who is prior in time is stronger in right." Per NESER J in *Van der Merwe* v *Scheepers,* 1946 T. P. D 147.

The legal issue becomes whether or not it is inequitable to apply this maxim to the facts *in casu*. According to Bryce's *History and Jurisprudence* vol 2 p 143:

> "Equity means to the Romans, fairness, right feeling, the regard for substantial as opposed to formal and technical justice, the kind of conduct which would approve itself of honour and conscience." (My emphasis).

However, INNES CJ sounded a warning in the use of equity in the following terms;

> "The court -------- has again and again had occasion to point out that it does not administer a system of equity as distinct from a system of law. Using the word equity in its broad sense, we are always desirous to administer equity; but we can only do so in accordance with the principles of Roman – Dutch Law. If we cannot do so in accordance with those principles, we cannot do so at all." See *Kent* v *Transvalsche Bank* 1907 T.S 774.

The issue *in casu* is whether the second buyers, namely, the first and second respondents have discharged the onus to prove special circumstances which would render it inequitable to apply the general rule. In order to answer this question, the court must consider the relevant facts and evidence contained in the affidavits. In my view the second buyers have failed to discharge the onus cast upon them by the law. Put differently, the second and third respondents have failed to prove the existence of special circumstances warranting the court the court to depart from the maxim referred to above.

I say so for the following reasons;

(a) While first and second respondents have shown that they are holders of a share certificate issued in October 2011 (approximately four years after the applicant acquired its share on 3 February 2007) they have not established a link between the share certificate and the plot in question i.e. Plot 66 Chegutu. They have failed to produce an agreement of sale between themselves and the company i.e. the fourth respondent. The purchase price has not been indicated. It is unknown how it was to be paid. The opposing affidavits by the first and second respondents are so shallow that one cannot conclude that they paid more for the plot than the applicants did because vital information has not been divulged to the court.

(b) It was submitted that special circumstances exist in that first and second respondents carried out substantial improvements on the plot. I disagree. Firstly, the well on the plot was dug by the applicants. Secondly, unlike in the *Guga* case where the second buyer only discovered one year later that property had previously been sold to another person, *in casu*, the first and second respondents were advised by the fourth

respondent (the seller) 3 to 4 months later that the property had been sold to the applicants prior to the issuance of a share certificate to them. The seller explained that an error had occurred and offered to allocate another plot to the first and second respondents. It should be noted that as at that time, there was only a razor wire around the plot and an incomplete structure.

Thirdly, again unlike in the *Guga* case, where after receiving information that the seller was advertising the house for sale, the first buyer did nothing about it, *in casu*, the Applicant immediately protested upon discovery of the fact that there was someone on the Plot. That the applicant did on 13 February 2012 in writing.

(c) Further as regards improvements, the respondents (first and second) continued to construct the structure after they became aware that the property had been sold to the applicants years before it was sold to them. For this reason it cannot be said as was the case in *Guga* that they, as second purchasers innocently improved the property. This fact is buttressed by their initial acceptance of damages after they acknowledged applicant's rights over the plot. Subsequently, as they changed legal practitioners, they quivered again and started claiming specific performance.

On these facts, I have come to the conclusion that there are no special circumstances which render it inequitable to apply the maxim *qui, prior est tempore potior est jure.*

Accordingly it is ordered that;

1. The first, second, third, fourth and fifth respondents be and are hereby interdicted from in any way disposing of plot 66 Chegutu Country Village, Chegutu.
2. The applicant be and is hereby declared the lawful owner of Plot 66 Chegutu Country Village, Chegutu.
3. Third, fourth and fifth respondents be and are hereby ordered to cancel the share certificate which the first and or second respondents hold in respect of Plot 66 Chegutu Country Village, Chegutu.
4. The first and second respondents be and are hereby ordered to surrender the share certificate in respect of Plot 66 Chegutu Country Village, Chegutu to the third respondent for cancellation within fourteen (14) days of being served with this court order.
5. The first, second, third, fourth and fifth respondents jointly and severally each paying the other to be absolved pay the costs of this application on a legal practitioner and client scale.

Kanokanga & Partners, applicant's legal practitioners
Zimbodza and Associates, first and second respondents' legal practitioners