Judgment No. SC 12/07
Civil Appeal No. 21/05

(1) NATIONAL EXECUTOR AND TRUST (PRIVATE) LIMITED (2) HOLLAND AND REDFERN (PRIVATE) LIMITED (3) REGISTRAR OF DEEDS BULAWAYO v ROSEMARY SINGINI

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA, & ZIYAMBI JA
HARARE, FEBRUARY 19 & DECEMBER 21, 2007

R M Fitches, for the first and second appellants

No appearance for the third appellant

H Zhou, for the respondent

ZIYAMBI JA: In the High Court the respondent ("Mrs Singini") obtained an order interdicting the first, second and third respondents from concluding an agreement of sale over stand number 16 Kingsdale Avenue, Queensdale, Bulawayo ("the property"), with a third party, and the fourth respondent from effecting transfer of the property in the event that the first three respondents have already concluded an agreement with a third party. This appeal is against that order.

The appellants maintain, in the main, that no *prima facie* right had been established and that the learned Judge erred in confirming the provisional order.

The respondent is the widow of the late Singini Zamani who was a lessee of the property known as 16 Kingsdale Avenue, Bulawayo ("the property"). She is also

the Executor of the estate of the late Singini Zamani. The property now forms part of the estate of the late Francois De Lange and is being administered by a director of the first appellant.

These proceedings were commenced by Singini Zamani ("Singini") who deposed to the founding and answering affidavits.

Singini averred that upon the death of De Lange, the first appellant ("the Trust") wrote advising him that the property was for sale and that he was to liaise with the second appellant ("Holland & Redfern") if he wished to purchase it. He was offered the right of first refusal by virtue of his status as sitting tenant on the property. In April 2002, Holland & Redfern invited him to make an offer, which he did – in the sum of Z$2 600 000.00. However, that offer was felt to be too low and Singini was told that Holland & Redfern would look for better offers but would give him the opportunity to match the highest offer if he was still desirous of purchasing the property. In that event, he would be required to pay 10% of the purchase price as a deposit, whereupon an agreement of sale would be drawn up, after the conclusion of which Singini would be required to pay cash or come up with a loan urgently.

On 3 July 2002 Singini was telephoned by S Meikle on behalf of the Trust enquiring whether he could match an offer of Z$3 million. Singini confirmed that he could.

On 5 July 2002, one Mukono acting on behalf of Holland & Redfern, telephoned to advise that he had received an offer of Z$3 million. Singini again confirmed that he would match the offer and Mukono then advised him to attend at Holland & Redfern's offices to sign the necessary agreement of sale and arrange for payment of the purchase price. He was advised that it would take a few days before the agreement of sale would be ready for signature. He asked Mukono to put in writing the request that he match the offer of Z$3 million.

The written confirmation came in the form of a letter dated 9 July 2002, from the first appellant and signed by Mrs S M Meikle. The letter reads in relevant part:

> "As you are aware we have now received an offer of $3 000 000.00 cash for the property you are renting. unless you are able to match this offer with a similar cash offer, we regret that your offer of $2 6000 000.00 is not acceptable to us. Please be guided accordingly. We are aware that Mr D Mukono of Holland & Redfern has advised you of the offer received...."

Thereafter, although he made it clear to Mukono that he needed the agreement of sale so that he could "process payment", his frantic efforts to hasten the drawing up of the agreement of sale by making telephone calls to the respondents proved fruitless. On 15 July 2002, he wrote to the Trust indicating his willingness to purchase the property at Z$3 million. The relevant part of the letter reads:

> "Your letter dated 9 July refers.
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> I confirm that the required amount of $3 000 000.00 per offer for the property is acceptable to me. May an agreement of sale be made so that I can access my funds."

On the same date, he visited Holland & Redfern's offices and was told by Mukono that payment of the sum of Z$3 000 000.00 was required, in cash, by 4.30pm that day or else the property would be sold to other cash buyers. He protested the unreasonableness of this request and reiterated that he needed the agreement for sale in order to access funds for payment of the purchase price. Thereafter, further attempts to obtain the agreement of sale from the appellants having proved fruitless, he referred the matter to his legal practitioners who also attempted to obtain an agreement of sale from the appellants to no avail.

It was not disputed by the appellants that Singini was granted a right of first refusal in respect of the purchase of the property or that Singini was told by the Trust that in the event he was able to match the highest offer he would be required to pay a deposit of 10% upon signature of an agreement of sale. Indeed, the letter from the Trust dated 17 April 2002 set the terms quite clearly. Paragraph 3 - 4 of the letter reads:

> "… We are aware that you have made an offer for $2 600 000.00. However, this has not been accepted to date. As you will appreciate as Executors it is in the interest of our clients that we obtain the highest possible price for the property and we cannot just accept the first offer received. If a higher offer is received for the property you having made the first offer will have the option to match the new offer received.
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> Please ensure that you have sufficient funds on hand to deposit 10% of the sale price with the Estate Agents on signing of any documents. We as Executors would also require a letter of guarantee from the company granting you mortgage loan facilities if the full offer was not to be a cash offer..."

Mr *Fitches* on behalf of the appellants, contended that the respondent was put on terms and, having failed to abide by them, the court a quo had erred in confirming the provisional order for an interdict when the respondent had not established a *prima facie* right entitling her to an interdict.

However, it seems the appellants have put the cart before the horse. In terms of the letter of 17 April 2002, quoted above, Singini was to have available a sum equivalent to 10% of the purchase price and to pay such sum upon signature of any documents. Thereafter he had the option of paying cash or providing the appellants with a letter of guarantee from the company offering him mortgage facilities. No deadline was set in that letter and it was therefore incumbent on Singini to respond within a reasonable time. It was not the appellants' contention that Singini had not responded within a reasonable time to that letter. (Indeed the learned Judge found that he had responded within a reasonable time). What the appellants say they did amounted to ignoring the letter and setting new terms. Thus they demanded payment in cash of the sum of Z$3 000 000 when the initial payment ought to have been Z$300 000. They set a deadline, the date of which is disputed and they provided no agreement for signature despite being requested to do so and despite the provision in the letter that the deposit should be paid upon signature of documents; despite also the fact that they must have known that the respondent would require the agreement of sale in order to source funds for the balance of the purchase price. (They anticipated that he might be applying for a loan hence the reference in the letter to "a letter of guarantee").

I therefore do not agree with Mr *Fitches* that no *prima facie* right was established. The respondent had a right of first refusal and was denied the right to exercise it in the manner provided in the letter to him by the appellants. The learned Judge found as follows:

> "Their conduct with all respect was *mala fide*. It has to be understood in that context in light of the fact that they had already accepted an offer from a Mr Ncube.
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> Whatever reason they had for changing their minds, they cannot be allowed to do so because a valid contract had already been concluded with applicant. Mr Bowes ignored applicant's letter of 15 July 2002 and also that of applicant's legal practitioner of 17 July 2002. He has not endeavored to explain away his behaviour and in the absence of any explanation I can only attribute this behaviour to either sheer ignorance of a simple office procedure of acknowledging correspondence or stubbornness. Unfortunately whatever reason it was does not help him as he is indeed liable for this problem.
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> As I state above all the three respondents were working together in this matter and it is their conduct which resulted in frustrating applicant. In my view, applicant has performed his part of the contract by exercising his right of refusal and also by matching the offer of $3 million within a reasonable time. Having so done he was entitled to specific performance by first, second and third respondents jointly and severally. Entitlement to specific performance was ably state by INNES J in *Farmers Co-op Society v Berry* AD 343 at 350."
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> > "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party. So far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in Thompson v Pullinger (10R at p 301). "the right of a plaintiff to the specific performance of a contract where the defendant is in a position to do so is beyond all doubt". It is true that courts will exercise discretion in determining whether or not decrees of specific performance should be made. They will not of course be issued where it is impossible for the defendant to comply with them …"

Applicant has proved on a balance of probabilities that respondents owe him a duty to perform that part of their bargain. See also *Patel v Greek Films (Private) Limited* 1973 (1) RLR 180 at 181 G-H.

I find no fault with the above reasoning.

Accordingly, it is my view that the order granted by the court *a quo* was correct and the appeal is without merit.

The appeal is therefore dismissed with costs.

SANDURA JA: I agree

CHEDA JA: I agree

Wintertons, first and second appellants' legal practitioners

Gill, Godlonton & Gerrans, respondent's legal practitioners