RODRECK TAKAWIRA
versus
PRECIOUS KAHWEMA
and
DORKING HOUSE (PRIVATE) LIMITED
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 4 October 2011 and 21 February 2012

Opposed Application

T. Mpofu, for the applicant
P. Makuvaza, for the 1st respondent

PATEL J: This is a dispute concerning the sale and transfer of a flat in Josiah Chinamano Avenue, Harare. The applicant has been the sitting tenant of the flat for many years. The 1st respondent purchased the flat from one Chiwara in July 2009 and acquired its ownership shares from the 2nd respondent in January 2010. He sought vacant possession but this was refused by the applicant. He eventually obtained an ejectment certificate which was registered with the Magistrates Court in August 2011. This registration is the subject of an appeal by the applicant lodged in September 2011 and pending before this Court in Case No. CIV(A)473/11.

In June 2010 the 1st respondent offered to sell the flat to the applicant for the purchase price of US$30,000. He avers that he did so out of desperation because the applicant refused to vacate. The applicant accepted this offer in July 2010. The 1st respondent's lawyers then wrote to the applicant in August 2010 calling on him to sign the agreement of sale and to pay the purchase price by a stipulated deadline. Following non-payment, the 1st respondent declined to proceed with the sale. He avers that the flat is now worth US$60,000.

In March 2011 the applicant obtained a mortgage loan for US$35,000. He now seeks an order for the sale agreement to be signed, transfer of title and registration of transfer, upon payment of the agreed purchase price. The principal issue for determination is whether the agreement of sale was breached by the applicant's failure to pay the purchase price by the fixed deadline.

The Salient Facts and Submissions

The 1st respondent's offer to sell was made by letter dated 23 June 2010. The offer was open until 15 July 2010. By letter of 12 July 2010 the 1st respondent's bank account details were furnished to the applicant's lawyers for them to deposit the purchase price in terms of the offer. They responded on 13 July 2010 to accept the offer on behalf of their client and to request a draft sale agreement. The draft agreement was duly prepared by the 1st respondent's lawyers and forwarded on 2 August 2010 for consideration. On 11 August 2010, they wrote again demanding that the agreement be signed and

payment be made by 13 August 2010, failing which the property would be put up for sale on the open market. The applicant's lawyers wrote back on 12 August 2010, asking to be furnished with proof of title. On 13 August 2010, they sent a further letter proposing certain amendments to the agreement, including a term that the purchase price was to be secured by a mortgage bond to be obtained by the applicant within 30 days. The 1st respondent's lawyers replied on 19 August 2010 to state that their letter of the 11th instant "still stands".

Adv. *Mpofu* submits that the contract between the parties was concluded on 13 July 2010 and that payment of the purchase price was not a condition for its conclusion. The payment terms were to be included in the draft agreement. The demand for payment by 13 August 2010 was unreasonable and did not place the applicant *in mora*, particularly as the 1st respondent's title had been queried on 12 August 2010. Moreover, through subsequent correspondence, the 1st respondent called for further meetings and thereby compromised the stipulated deadline. The applicant is now ready to carry out his payment obligation under the contract and therefore has the right to demand performance from the 1st respondent, *i.e.* signature of the agreement and transfer of title.

Mr. *Makuvaza* does not dispute the offer and acceptance of the contract. He submits, however, that mere acceptance was not enough as the contract was conditional upon signature of the agreement of sale and payment of the purchase price. In this regard, the draft agreement stipulates payment upon its signature. In any event, the

applicant should have queried the 1st respondent's title earlier. The demand for payment by 13 August 2010 was not unreasonable, as the applicant had already been furnished with the requisite documents, *i.e.* capital gains certificate, agreement of sale with Chiwara and share certificate from the 2nd respondent. The applicant's lawyers only sought confirmation of title from the latter in February 2011. The applicant was simply dilly-dallying as he did not have the necessary funds to purchase the property when he accepted the offer. His mortgage loan was only confirmed in March 2011.

Disposition

While I am prepared to accept that the 1st respondent might have made his offer to sell the flat out of desperation and frustration, I do not think it can be said that he lacked the requisite *animus contrahendi*. When he made the offer, through his lawyers, he did so with full understanding of its implications, and clearly intended that his offer, once accepted, would create a binding contract.

The more pertinent question is whether or not there was a failure to perform timeously on the part of the applicant. When the contract does not fix a time for performance, the general rule is that there can be no *mora ex re* but only *more ex persona*, so that a demand by the creditor is necessary in order to place the debtor *in mora*. Even though time may be of the essence, the debtor is not *in mora* and the creditor cannot cancel for non-performance unless a proper demand for performance has been made. See Christie: *The Law*

of Contract in South Africa, at pp. 555 & 562, cited in *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* SC 21-09, at p. 8.

In the present matter, the offer to sell was made on 23 June 2010 and accepted on 13 July. The draft agreement was then prepared and forwarded to the applicant on 2 August. On 11 August the 1st respondent demanded signature and payment by 13 August. The applicant sought proof of title on 12 August. He then proposed certain amendments to the agreement on 13 August and intimated that the purchase price was to be secured by a mortgage bond to be obtained within 30 days. The 1st respondent replied on 19 August to state that his position of 11 August still stood. There was subsequent correspondence from the 1st respondent in September and October 2010 calling for meetings to finalise the transaction.

On the above facts, given that the applicant had been furnished with all the documents necessary to conclude the transaction, it seems to me that the 1st respondent's demand for payment of the purchase price by 13 August was proper and not unreasonable. The applicant's request for proof of title was no more than a dilatory tactic designed to forestall the payment of the purchase price for which he did not have the requisite funds. Moreover, I do not consider the 1st respondent's subsequent requests for meetings as constituting an unequivocal waiver of the stipulated deadline.

Even if it were to be found that the deadline for payment was improper and unreasonable, I take the view that the applicant should have taken steps to pay the purchase price within a reasonable time.

See *Annamma* v *Moodley* 1943 AD 531 at 538, where it was held that, where no period of time is fixed for the exercise of an option to purchase, it may be inferred from the surrounding circumstances that the parties intended that the option be exercised within a reasonable time. What is reasonable will obviously depend on the particular circumstances of each case. In the instant case, it is fairly clear that payment of the purchase price within a reasonable time was anticipated by both parties. Despite his indication that he would secure a mortgage loan within 30 days of the deadline, the applicant was unable to make any payment whatsoever towards the purchase price. He was only in a position to do so in March 2011, six months later, when the approval of his loan was confirmed. A week later, he rushed to institute the present application to compel transfer. The overall delay of eight months after he accepted the offer is patently inordinate and must be held to be unreasonable in the circumstances of this case.

It follows from all of the foregoing that the applicant failed to pay the purchase price by the fixed deadline or within a reasonable time after he accepted the offer. He was therefore in breach of the agreement of sale and cannot seek an order to compel performance of the agreement. In the result, the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Sinyoro & Partners, 1st respondent's legal practitioners