

**Edgars Stores
Versus
Varel Investments
And
Others**

HIGH COURT OF ZIMBABWE
PATEL J
HARARE, 14, 22 and 29 July
and 8, 14 September 2005

Urgent Application

Advocate Machaya, for applicant
Advocate Morris, for 1st and 2nd respondents

PATEL J:

The Facts

The Applicant in this matter seeks an interim order restraining the respondents from disposing of or transferring certain immovable property, known as Katamon Court, in Harare. The applicant also seeks a final order effectively transferring the said property into its name and ownership through the execution of a share subscription agreement.

In support of its claim, the applicant avers that the parties concluded a binding oral agreement in February 2005 for the sale of the property at the purchase price of \$6 billion. The 1st and 2nd respondents deny any such binding agreement and dispute the applicant's right to acquire the property for \$6 billion.

As I have already indicated, the applicant relies on an oral agreement allegedly concluded in February 2005. (However, no specific detail is provided in its founding affidavit as to the content and terms of such agreement). Subsequently, two draft agreements were prepared on behalf of the 1st respondent and presented to the applicant for its consideration. These drafts were shelved after the passage of the agreed deadline of the 1st of March 2005 for payment of the purchase price. Thereafter, further discussions and negotiations ensued between the parties' directors and agents. Additionally, the applicant commissioned a firm of chartered accountants to carry out a limited financial due diligence review of the 1st respondent. Eventually, a third draft agreement was prepared on behalf of the applicant in June 2005. This too remained unsigned and inoperative.

Apart from the aforementioned events, on the 3rd of March 2005, the applicant wrote a letter to the MBCA Bank in Bulawayo, allegedly in pursuance of its discussion with the 1st respondent's estate agent. This letter instructed the

Bank to invest \$6 billion at 50% interest for the benefit of the 1st respondent. The letter was copied to the applicant's Group Secretary and its legal practitioners but to no one else. The respondents and their directors were not involved in this process at all and therefore did not react to it in any way, either positively or otherwise.

Decision

The evidence of the 1st and 2nd respondents' director, Haaken Ludvig Mordt, as contained in his opposing affidavit, is that the sale of the property was subject to a strict time-frame and was to be concluded by the 1st of March 2005. The sale was to take the form of a subscription sale agreement. Very significantly, he avers that any discussions or negotiations between the parties were not to be treated as binding until a written agreement was duly executed by the parties. On the papers filed of record and in argument before me, Mordt's evidence was not satisfactorily contradicted by the applicant.

The evidence of the estate agent involved in the negotiations, Merenia Chifamba, supports the averments made by Mordt. She states that the original price of \$6 billion fell away after the initial deadline had elapsed. She further avers that the applicant subsequently indicated its willingness to negotiate a new purchase price.

In my view, the respondents' position is amply supported by the following factors :

- (a) The first and second draft agreements prepared by the respondents fix the date of payment as being the 1st of March 2005.
- (b) Both draft agreements contain an explicit clause (clause 7) stating that due execution of the agreement, i.e. signature thereof, shall be a condition precedent to its binding force and effect.
- (c) The applicant's offer of \$6 billion on the estate agent's offer form was never accepted by the respondents in writing, either on that form or otherwise.
- (d) The applicant's instruction to the MBCA Bank to deposit the sum of \$6 billion in an escrow account, as per its letter of the 3rd of March 2005, was not communicated to or in any way acknowledged or affirmed by the respondents or their legal practitioners or their agents at the critical time, i.e. in early March 2005.
- (e) The third draft agreement, prepared by the applicant, only refers to the purchase price of \$6 billion and makes no mention of any

additional consideration arising from the interest that would have accrued on the deposit of \$6 billion.

- (f) The fact that the applicant subsequently commissioned a due diligence review of the 1st respondent's affairs clearly contradicts the existence of any firm prior agreement between the parties.

Apart from the above very compelling factors, I also take the view that the applicant's averment as to the existence of a binding oral agreement between the parties is bald and sketchy. The applicant's position in this regard is abundantly contradicted by the clear evidence submitted on behalf of the 1st and 2nd respondents. At most, all that the applicant has been able to establish is an agreement to agree.

It is trite, both in English and Roman-Dutch law, that an agreement to enter into an agreement or an agreement to negotiate in good faith is not recognisable in law and is therefore unenforceable. (See *Courtney v Tolaini Brothers (Hotel) Ltd & Another* [1975] 1 All ER 716 and *Chirimani v Minister of Works* G-S 198/1980).

In my view, the applicant has patently failed to establish the first requisite for a temporary interdict, viz. a clear or *prima facie* right to acquire the property *in casu* for the price of \$6 billion. In the result, the application is dismissed with costs.

Gill, Godlonton & Gerrans, applicant's legal practitioners
Coglan, Welsh & Guest, 1st and 2nd respondents' legal practitioners