TENDAYI CHIKOORE v (1) MARTHA BERE (2) CHIPO PATRICIA GARWE (3) THE REGISTRAR OF DEEDS (4) MESSRS WARARA & ASSOCIATES

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MALABA JA
HARARE, MARCH 20 & MAY 28, 2007

J Dondo, for the appellant

G C Chikumbirike, for the first & second respondents

No appearance for the third respondent

No appearance for the fourth respondent

ZIYAMBI JA: On 23 February 2005 the High Court confirmed a provisional order granted in favour of the first and second respondents on 18 December 2001 in the following terms:

> "TERMS OF ORDER MADE
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> (a) That the first respondent be and is hereby interdicted from selling the property known as 3985, WINDSOR PARK, RUWA in the District of Goromonzi to any other person other than the applicant.
>
> (b) That the third respondent proceed to lodge the transfer papers with the fourth respondent and get the property known as 3985 WINDSOR PARK, RUWA, to be registered in the name of the applicants' against payments of the balance of the purchase price.
>
> (c) That the first respondent pay to Messrs Warara & Associates the amount due to the City of Harare to enable a rate clearance certificate to be obtained within seven days of date of this order.
>
> (d) That the first respondent pay costs of suit.
>
> INTERIM RELIEF ALLOWED/MADE

That pending the determination of this matter, applicant is granted.

The first respondent is ordered to release the Title Deeds to the property in question to second respondent who shall hold them until the court has given a final order on this matter.

(a) That the first respondent be and is hereby interdicted from selling or transferring the property described in paragraph (a) of the final order above before a final decision is made on paragraph (a); (b) and (c) above.

(b) That the fourth respondent be and is hereby ordered/interdicted from registering the transfer of the property described in paragraph (a) above."

The appellant now appeals to this Court against that order. The main ground of appeal was that the learned Judge misdirected himself in finding there were no material disputes of fact and that the conflicting evidence on the papers could be determined without calling evidence.

It is necessary to set out the background facts which are as follows -

In September 2001, the appellant and the first respondent concluded an agreement of sale in respect of certain property known as 3985, WINDSOR PARK, RUWA ("the property"). In terms of that agreement the purchase price was ZW$2 600 000 and the first respondent who is a non-resident of Zimbabwe was to pay to the appellant by way of a deposit of ZW$1 000 000,00, a further deposit of 3 000 British pounds upon signature of the agreement, and the balance of 3 000 pounds to be paid in terms of an acknowledgement of debt which was to be drawn up and signed by the purchaser/respondent. That agreement was reduced to writing and, although it was not signed by the parties, it appears that both parties agree that the agreement embodied in that written document was a valid agreement. This agreement was to be signed at the offices of

Messrs Warara & Partners who had reduced it to writing. Clause 9 of that agreement provided that any alteration thereto would be invalid unless reduced to writing and signed by both parties.

On 12 September 2001, the parties presented themselves at the offices of Messrs Warara & Partners and certain variations to that agreement were suggested which related to the purchase price and the manner of payment thereof. In particular, the purchase price of ZW$2 600 000 was now to be paid by a deposit of ZW$500 000 as well as a payment of 3 000 British pounds. The balance of the purchase price, now stated as 2 250 British pounds, was to be paid in "two equal instalments of 1 200 pounds and 1 050 pounds by no later than 31 October 2001". On an ordinary reading of the proposed amendment it would appear that the pound value of the purchase price had increased to 6 450 pounds. However the parties appear to agree that, instead, the pound value had decreased to 5 250 pounds and that the balance after payment of the deposit was 2 250 which was to be paid in two instalments of 1 200 and 1 050 pounds respectively, by 31 October 2001. It was agreed that these variations to the agreement would be put in writing and that the parties would attend at Messrs Warara & Partners on the following day for signature of the agreement so varied. The parties attended as agreed but the appellant developed "cold feet" and refused to sign the variation.

The first and second respondents contended that notwithstanding the appellant's refusal to sign the amended agreement, that agreement was valid and enforceable as the reduction to writing was meant merely as proof of what the parties had agreed to the day before. Accordingly, they took the view that the appellant was

contractually bound to perform his part of the agreement and to tender transfer on receipt of payment of the balance of the purchase price.

The appellant on the other hand averred that it was agreed by the parties that the agreement would only become binding after signature by both parties.

The learned Judge took the view that since the essential elements of the agreement of sale were agreed by the parties the written agreement was meant to be as a memorial only of the oral variation made by the parties. I proceed to examine the ground of appeal in the light of the background set out above.

In his opposing affidavit the appellant raised the following disputes of fact. Firstly, he averred that it was agreed that the variation of the (written) agreement would only come into effect upon signature thereof.

A close look at the terms of the written agreement reached by the parties appears to support the appellant. Clause 9 thereof requires any variation thereof to be in writing and signed by the parties. Thus the written variation would have to be signed by the appellant before it could be clothed with validity. This would tend to support the appellant's stance that the agreement had to be signed by the parties before it could come into effect. Since the appellant did not sign the varied document the variation did not come into effect. It was null and void. In the result, there was no variation of the agreement.

The appellant averred further that shortly after his refusal to sign the agreement, he spoke to the first respondent on the telephone and she also said she no

longer wished to pursue the agreement. This allegation was not denied by the first respondent who filed no answering affidavit. Accordingly, in the face of this uncontroverted evidence it was imprudent for the Court to take a robust view which ignored this evidence which clearly meant that the agreement was cancelled by mutual agreement.

The appellant also took the point on appeal that it was improper for counsel for the first respondent who is the deponent to the founding affidavit, to appear to argue the case on the respondent's behalf.

Whilst it is common for legal practitioners to swear affidavits on behalf of their clients, it is novel procedure for the legal practitioner who is the deponent of the founding affidavit to appear and argue his client's case. Mr *Chikumbirike* concedes that the facts averred in the founding affidavit were not of his personal knowledge but were received by him by way of instructions from his client. This may or may not be the reason why no answering affidavit was filed to rebut the averments made in the opposing affidavit which clearly called for a reply.

Other issues were raised in the grounds of appeal, for example the issue of the legality or otherwise of the transaction *vis-a-vis* the Exchange Control Act and Regulations; and that it was not clear from the document what were the terms of the agreement.

The questions raised remain unanswered or unsatisfactorily determined.

In the result, therefore, I am of the view that the disputes of fact are such that they could not have been resolved on the papers before the court *a quo.*

Accordingly it is ordered as follows -

(1) The appeal is allowed with costs;

(2) The matter is referred to the High Court for trial;

(3) The founding affidavit shall stand as summons and the opposing affidavit as an appearance to defend and;

(4) The pleadings shall proceed thereafter in terms of the High Court Rules and the date of filing of the declaration in terms of Rule 112 shall be calculated from the date of this judgment.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Chinamasa, Mudimu & Chinogwenya, appellant's legal practitioners

Chikumbirike & Associates, first & second respondent's legal practitioners