MAXWELL MATSVIMBO SIBANDA
versus
GWYNNE ANNE STEVENSON

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 23 November 2009 and 24 February 2010

**Civil Trial**

*I E G.Musimbe*, for the plaintiff
*E W W Morris*, for the defendant

CHITAKUNYE J: On 28 February 2007, the plaintiff entered into a deed of sale with the defendant for the purchase of an immovable property being subdivision B of subdivision D of subdivision A of Lot 4 of Lot A of Colne Valley of Rietfontein otherwise known as 47 Addington Lane Ballentine Park, Harare.

Ms Lauraine O'neil was the defendant's selling agent.

The clauses on the purchase price and manner of payment stated that:

3. The purchaser shall pay to the seller the amount of GBP180 000-00 (one hundred and eighty thousand British pounds for the property.
4. The purchaser shall pay the purchase price to the seller free of bank commission and any bank special clearance charges or other such charges, by means of the following installments:

    (a) GBP30 000 (Thirty thousand British pounds) on or before 31 March 2007.
    (b) GBP30 000-00 (thirty thousand British pounds) on or before 30 July 2007.
    (c) GBP30 000-00 (thirty thousand British pounds) on or before 30 December 2007
    (d) GBP30 000-00 (thirty thousand British pounds) on or before 31 March 2008
    (e) GBP30 000 (thirty thousand British pounds) on or before 30 July 2008
    (f) GBP30 000-00 (thirty thousand British pounds) on or before 30 November 2008.

Other clauses pertinent to the resolution of the dispute were as follows:

Clause

"7. The purchaser is currently renting the properties and will continue paying monthly rental, equivalent to the official midbank rate of GBP250-00 (two hundred and fifty British pounds) until such time as the full purchase price has been paid.
8. …
9. With effect from the effective date the purchaser shall ensure that at all times a good and sufficient insurance policy is maintained in respect of the properties and that the improvements thereon are insured against all the risks specified in such policy for the current replacements or reinstatement value thereof".

On the status of the Deed of Sale Clause 17 states that:

> "This Deed of Sale represents the entire contract between the parties and no oral amendment thereof or addition thereto shall have any force or effect unless and until reduced to writing and signed by the parties each before two witnesses"; and lastly

Clause 19/20 as amended states that:

> "The purchaser acknowledges having been introduced to the seller by Lauraine O'neil and confirms that the commission of 7 $^{1/2}$ % (seven and a half percent) calculated at the pararrel market rate on the date of payment and 15% VAT due will be paid to her in two equal installments one paid at the time of the first installment which is due on 31 March 2007 and the second one paid on 31 May 2007."

On 30 March 2007, the plaintiff tendered to Lauraine O'neil a sum of $14 400 000-00 (Zimbabwean currency) purportedly as payment for the first installment of GBP30 000-00. That tender was rejected by the defendant through her legal practitioners as not being in accordance with the Deed of Sale. The defendant demanded payment of the said installment in British pounds sterling as is stated in the agreement within fourteen days by their letter dated 4 April 2007.

On 27 April 2007 the defendant purported to cancel the Deed of Sale as the plaintiff had not paid the first installment.

The plaintiff challenged the cancellation of the deed of sale. On 10 January 2008 the plaintiff sued the defendant. The plaintiff's claim was for:

1. An order declaring that the agreement between the parties remains in force.
2. An order that the defendant transfer to the plaintiff subdivision B of subdivision D of subdivision A of Lot 4 of Lot A of Colne Valley of Rietfontein on payment of the purchase price in full in Zimbabwean currency and on compliance with the other terms and conditions of the agreement of sale.

The defendant admitted entering into the said Deed of Sale with the plaintiff with the terms and conditions as reflected therein. She contended that the purchase price was payable in British pounds sterling, as is stated in clause 3 and 4 of the Deed of sale. She categorically denied that payment was to be in Zimbabwe dollars.

The amounts payable by the plaintiff in Zimbabwean currency were the commission to L O'neil together with 15% VAT and the rentals. To this extent the defendant referred to clauses 7 and 19/20 of the deed of sale.

In the alternative the defendant concluded that there was no consensus *ad idem* between the parties with regard to the purchase price and, , if the defendant had known that it was the plaintiff's intention (which is denied) that the purchase price was to be paid in Zimbabwean dollars equivalent of GBP180 000-00 the defendant would not have entered the contract with the plaintiff.

The defendant made a counter claim in which she prayed for an order that:

(a) The sale of the property is void;
(b) The plaintiff shall give the defendant immediately vacant possession of the property;
(c) The plaintiff shall ensure the property 's improvements against the risks specified in a standard home owner's insurance policy, for their current replacement or reinstalement value from time to time, and until on in time as he gives the defendant vacant possession the property; and
(d) The plaintiff shall pay the defendant's cost of suit on the legal practitioner and client scale.

A total of fourteen issues were identified for trial. The first six of these issues which I believe reflect the core of the dispute included the following:

1. Was the purchase price 180 000-00 British pounds or the Zimbabwean dollar equivalent thereof?
2. What did each party intend the purchase price to be – #180 000-00 British pounds or the Zimbabwean dollar equivalent thereof.

3. If it was the plaintiff's intention that the purchase price was to be the Zimbabwe dollar equivalent of 180 000-00 pounds, was these consensus *ad idem* between the parties with regard to the purchase price.
4. If the purchase price was payable in the form of #180 000-00 as opposed to the Zimbabwe dollar equivalent thereof, was it payable in Zimbabwe or outside Zimbabwe?
5. Given the plaintiff's averment that he has never had free funds or funds in a foreign currency account, did the sale contravene the provisions of the Exchange Control Act and regulations, thereby rendering itself illegal, void and unenforceable?; and.
6. Did plaintiff's refusal to pay the purchase price in British pounds sterling exhibit a deliberate and unequivocal intention no longer to be bound by a material term of the sale?

The cardinal point revolved on the purchase price and manner of payment of that purchase price.

The plaintiff gave evidence after which his wife testified. A bundle of documents was tendered into evidence. In his evidence the plaintiff made reference to some of the documents in that bundle.

The plaintiff's evidence was to the effect that though the purchase price and manner of payment were expressed in British pounds sterling, the actual payment was in fact to be effected in the Zimbabwean dollar equivalent. He argued that that is what the parties agreed to. The exchange rate was the mid bank rate/official bank rate.

From the pleadings filed of record and the plaintiff's evidence, it is common cause that the sellers were resident outside Zimbabwe. Both the plaintiff and his wife confirmed that to their knowledge the sellers had no intentions of ever coming back to Zimbabwe.

It is thus common cause that from the onset the plaintiff knew that the purchase price he was to pay irrespective of the currency was for the credit of a non-resident. It is further common cause that apart from the purchase price, the plaintiff was required to pay other sums comprising 7.5% commission to Lauraine O'neil and 15% value added tax and rent for the property in question.

In terms of clause 7 of the Deed of sale the rentals which the plaintiff was to continue paying until the purchase price was paid in full was pegged at GBP250-00 paid in Zimbabwe dollars equivalent to the official mid bank rate.

Clause 19/20 on dealing with the commission states clearly that the 7.5% commission to be paid by the plaintiff to Ms L O'neil was to be calculated using the pararrel market exchange rate. This was clearly illegal. It is nevertheless what the parties agreed to.

It is very clear from the above two clauses that apart from quoting the currency in British pounds sterling, the parties went further to provide the exchange rate to be applied in respect of each payment.

It is these same parties, who were alive to the different rates of exchange who in their clauses 3 and 4 of the Deed of sale, did not provide for an exchange rate.

Clauses 3 and 4 do not in any way show that the British pounds sterling were to be paid out in any other currency.

The plaintiff and his wife could not point at any amendment that was made to the above clauses. They also could not say, why there was no provision for an exchange rate if it was agreed that the purchase price be paid in Zimbabwe dollars.

It was a case of arguing that because the rentals and commission were paid in Zimbabwean dollars, so the purchase price was to be paid in the same currency.

After the plaintiff had closed his case the defendant applied for absolution from the instance contending that the plaintiff had not established a case for the defendant to be called upon to rebut.

An absolution from the instance maybe granted where from the evidence adduced, the plaintiff has not made out a case whereby a reasonable court may or could find in his favor if the defendant did not rebut the testimony given.

In *Lourenco* v *Raja Dry Cleaners & Steam Laundry* (*Pvt*) *Ltd* 1984 (2) ZLR 151 (S) DUMBUTSHENA CJ quoted with approval the words of CORBETT JA in *Mazibuko* v *Santam Insurance Co Ltd & Anor* 1983 (3) SA 123 (AD) at 132-1323 H whereat CORBETT JA said that:

> "In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the court must address itself is whether the plaintiff has adduced evidence upon which a court, applying it s mind reasonably, could or might find for the plaintiff in other words whether the plaintiff has made out a *prima facie* case. This is trite law".

In *casu* the hurdle the plaintiff had to overcome pertained to clear clauses that the parties agreed to. The question is – could or might a reasonable court applying its mind

reasonably to the evidence adduced by the plaintiff find for the plaintiff that payment was to actually be made in Zimbabwe dollar equivalent; moreso equivalent at the official exchange rate. Is it possible that the court could or might find that the parties in fact agreed on the exchange rate

The clauses dealing with the purchase price and manner of payment admit of no ambiguity at all. The clauses that dealt with other payments, other than the purchase price went further to state in what currency they would be paid in and at what exchange rate. The omission of an exchange rate for the purchase price when paying in Zimbabwe dollars was clearly deliberate as the parties did not intend that the purchase price be paid in Zimbabwe dollars.

The plaintiff's contention in this regard is clearly untenable. As was shown during the cross-examination of the plaintiff, the GBP 180 000-00 was about 86 million Zimbabwe dollars if exchanged at the then official exchange rate. Yet the plaintiff himself had said he initially offered 1.5 billion Zimbabwe dollars which apparently was not accepted. The plaintiff later said the purchase price was 1.6 billion Zimbabwe dollars. That again could not have been at the official exchange rate. It may also be noted that the 7.5% commission that the plaintiff was required to pay to Ms L O'neil at the pararrel market rate was in fact far in excess of the purchase price calculated at the official rate.

In his letter to Ms O'neil dated 7 July 2006 (at p 10 of the plaintiff's bundle) the plaintiff complained about the seller's change of prices. In that letter he indicated that he had initially offered 1.5 billion Zimbabwe dollars but the seller had asked for 170 000-00 United States dollars. When he agreed to this price and as he was waiting for the agreement of sale, the seller changed the price to 220 000-00 United States dollars which he again accepted. On p 2 of that letter, second last paragraph, he alludes to the fact that as of June 2005 US$220 000-00 was equivalent to Z$7 000 000 000-00 (Zimbabwean dollars) and that as of July 2006 it had now jumped to Z$99 billion Zimbabwe dollars. These figures and phenomena increases were indicative of the plaintiff converting the price from United States dollars to Zimbabwe dollars at pararrel market rates and not official mid bank rates. He in fact went on to quote the price in British pounds and said that was now Z$153 billion (Zimbabwe dollars) This was for the GBP 180 000-00.

The impression created is that the plaintiff was using the pararrel market rate to assess his ability to acquire the requisite foreign currency needed for the purchase price.

The plaintiff confirmed that in the correspondence or communication he was receiving from Ms L O'neil it was clear the sellers were asking for the purchase price in foreign currency.

It was in this vein that he was heard to say he did not know how O'neil was going to handle what he would have paid to ensure it reached the sellers.

It is clear to me that the plaintiff has not established a *prima facie* case that the purchase price was payable in Zimbabwe dollars. If anything, it is apparent that the purchase price was payable in foreign currency i.e. in British pounds sterling.

The plaintiff did not deny knowledge of clause 17 of the Deed of Sale. As already alluded to that clause it states that the Deed of Sale represents the entire contract between the parties and no oral amendment thereof or addition thereto shall have any force or effect unless and until reduced to writing and signed by the parties each before two witnesses.

No amendment was made to the purchase price and manner of payment thereof. The plaintiff's evidence fell far short of showing that any such amendment was ever agreed to, let alone put in writing

Thus clause 3 which states that the purchaser shall pay to the sellers the amount of GBP180 000-00 (one hundred and eighty thousand British pounds) for the property remained intact. Clause 4 that provided for payment in six installments of GBP30 000-00 each also remained intact.

The Deed of Sale did not state where the payment was to be made. This becomes a matter of the plaintiff's word. If it was to be made in Zimbabwe it was still going to be contrary to the Zimbabwe laws.

Section 10 (1) of the Exchange Control Regulations SI 109/96 states that:

> "10(1) unless authorized by any exchange control authority, no person shall, in Zimbabwe –
>
> (a) make any payment to or for the credit of a foreign resident; or
> (c) place any money to the credit of a foreign resident.
>
> Section 10 (2) states that:
>
> Subsection (1) shall not apply to:
>
> (a) any payment lawfully made from money held in a foreign currency account or
> (b) such other transactions as maybe prescribed."

In his evidence the plaintiff said he had no money in a foreign currency account and so he was not exempted from seeking authority. It was his evidence that at the time of entering into the Deed of Sale he had not obtained authority from any Exchange Control Authority. There was no denying that the Deed of Sale obligated him to make payment for the credit of a foreign resident. It was also his evidence that at the time he attempted to make the first payment in Zimbabwe dollars he had not obtained the requisite authority.

Indeed as at the date of trial which was well after the date when the last installment was due he still had not obtained the requisite exchange control authority. Even his purported tender of the full purchase price in Zimbabwe dollars was done without such authority. Such purported tender was therefore illegal and of no force or effect.

In *Macape* (*Pty*) *Ltd* v *Executrix, estate Forrester* 1991 (1) ZLR 315 (S) at 320 B-D MCNALLY JA had this to say about the above situation:

> "In other words, where one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But without authority from the Reserve Bank, the actual payment may not be made".

In *Barker African Homes Homesteads Touring & Safaris* (*Pvt*) *Ltd* & Anor *2003* (2) ZLR 6 *(*S) SANDURA JA had this to say on payment in Zimbabwe in Zimbabwe dollars but for the credit of a non-resident at p 9 B-C:

> "Whilst the agreement to pay Z$15 000 000-00 to or for the credit of *Barker in* Zimbabwe would not be unlawful, the actual payment would be unlawful unless authorized by the exchange control authority.

That is so because of the wording of s 10 (1)(a) of the Regulations which read as follows:

> "Unless otherwise authorized by an exchange control authority no person shall in Zimbabwe:
>
> (a) make any payment to or for the credit of a foreign resident".

I am of the view that even if court were for some reason to accept that payment was to be in Zimbabwe dollars, which I am not accepting, any purported payment in furtherance of the Deed of Sale to or for the credit of the defendant was unlawful. This court cannot be seen

to be sanctioning such purported payment as valid for the purposes of enforcing the Deed of Sale.

The plaintiff's purported tender was without authority and so unlawful. In terms of clause 4 of the Deed of Sale, the first installment was supposed to have been paid on or before 31 March 2007 and the last installment on or before 30 November 2008.

No payment or lawful tender was made for the payment of the purchase price and so the plaintiff has lamentably failed to establish a *prima facie* case for the enforcement of the Deed of Sale.

No reasonable court can or might find for the plaintiff from the evidence adduced so far. It would be an exercise in futility to put the defendant on her defence.

The defendant's counter claim was based on the plaintiff's default in complying with the terms of the Deed of Sale.

In as far as I have made a finding on the unlawfulness of any purported tender, clearly the plaintiff has not complied with the terms of the Deed of Sale. The condition to him complying with the Deed of Sale was that he had to obtain the requisite authority which he did not.

In *Brian Stevenson* v *Maxwell Matsvimbo Sibanda* HC 3212/08 which was to be heard together with this case HC 161/08, the plaintiff sought the immediate eviction of the defendant for the property in question and payment of holding over damages from 15 July 2007.

This relief sought is similar in some material way to G A Stevenson's counter claim in HC 161/08

It is my view that the decision in HC 161/08 should assist the parties in this regard. As the plaintiff in HC 3212/08 did not give evidence I cannot make a determination on it. The cardinal point at this stage is whether to give an absolution from the instance in HC 161/08 or not. That is the concern of this ruling.

Accordingly I hereby grant the defendant an absolution from the instance with costs.

*Kantor & Immerman*, plaintiff's legal practitioners
*Wintertons*, defendant's legal practitioners