REPORTABLE (36)

Judgment No. S.C. 61/2001
Civil Appeal No. 249/2000

STEWART SAUNGWEME v

(1) SARAH GANDIWA-MAGAYA (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA
HARARE, JUNE 26 & JULY 17, 2001

Ms E Mushore, for the appellant

No appearance for the respondents

McNALLY JA: This is a dispute arising out of the cancellation of an agreement of sale of immovable property between the first respondent as seller and the appellant as purchaser. The Registrar of Deeds has been cited and served in compliance with the provisions of s 79 of the Deeds Registries Act [*Chapter 20:05*], but has taken no part in the proceedings. I will refer to the parties as "the seller" and "the purchaser", and to the subject of the dispute as "the property".

The seller and the purchaser entered into an agreement of sale in respect of the property on 28 December 1998. The price was $800 000. The only relevant terms of the agreement, for our purposes, are the following:

> "1.A The sum of $800 000 to be paid in cash against transfer which amount will be made available to the purchaser by a 100% Zimbank loan."

> "Special Conditions 1

> This sale is conditional upon the purchaser obtaining the loan as in Clause 1 above or such lesser amount as may be acceptable to him for same within thirty days of the date hereof which loan will be applied for by the purchaser on the signing hereof and accepted by him when offered."

"General Condition 7(b) Breach of Contract

> In the event of the purchaser failing to pay the purchase price (or any instalment thereof) and any other sum payable in terms of this agreement or omitting to observe or perform any of the terms, conditions, stipulations or obligations herein and failing to make good such default or remedy such breach within fourteen days of the date of posting to or serving on the purchaser a written notice directed to the address denoted overleaf requiring the purchaser to do so then, notwithstanding any previous waiver, the seller shall be entitled without further notice to declare this agreement of sale cancelled …".

The purchaser says, and he is not contradicted, that he obtained a loan on 5 February 1999. (It is to be noted that he is an employee of Zimbank, from whom the loan was to be obtained.) This was some days outside the thirty day period stipulated, but he remedied the breach without being put on notice.

Although he advances no proof of having obtained the loan on that date, it seems that matters proceeded as if he had done so. The seller nominated her conveyancers, Messrs Kantor & Immerman, on 24 February 1999.

Then, on 4 March 1999, the seller wrote to the purchaser giving fourteen days notice of cancellation on the grounds that:

> "you are now in breach of contract as you have failed to produce documentary evidence that you have been granted a loan for the full purchase price of the property from your employer within the stipulated period of thirty days as per our agreement."

She then wrote cancelling the agreement on 21 April 1999. In the letter of 4 March she had urged him to:

> "make right your position within fourteen days of this notice, failure (sic) which this agreement is cancelled without further notice to yourself."

Meanwhile, however, the conveyancing procedures had been set in motion. On 16 March Kantor & Immerman had written to the purchaser tendering transfer of the property. They required him, "within not more than fourteen days from the date hereof ", to pay the costs of transfer and the purchase price or furnish a suitable letter of undertaking. (It should be noted that this time limit was not a notice of cancellation in terms of clause 7(b) of the agreement). He says, again without contradiction, that he paid the costs of transfer on 30 March. The letter of undertaking, however, was dated 6 April and was received by Kantor & Immerman on 8 April. The conveyancers then proceeded with the transfer, which was lodged with the Registrar of Deeds during the week 19-23 April. This was done before they received a copy of the seller's letter of cancellation dated 21 April.

Kantor & Immerman warned the seller that she would have to give them specific instructions to withdraw the papers from the Deeds Office (assuming the transfer had not already been registered, which in fact it had not), and that such action might lay her open to an action by the purchaser. Nevertheless she persisted. The purchaser then approached the High Court by way of application to compel the seller to sell. He lost, and now appeals.

The two main grounds of appeal, if I may paraphrase them, are –

1. The alleged breach of contract was not in fact a breach.

2. The learned judge relied for her conclusion on a ground not pleaded or raised by the seller.

I will deal with them in turn.

The first point taken on behalf of the purchaser is that the contract did not require him to produce documentary evidence that he had been granted a loan for the full purchase price of the property. It required him only to "obtain a loan" in the form of "a 100% Zimbank loan".

He says he did obtain such a loan on 5 February 1999. He does not, unfortunately, elaborate. But, as I remarked earlier, his statement is not denied. Nor was he put to the proof of his averment.

The difficulty, I think, is that each of them has put a different interpretation on the phrase "obtain a loan". The seller was anxious to have a piece of paper. It appears from her affidavits that she wanted a document she could use as security for her to raise money for some other purposes. So for her, "obtaining a loan" meant "securing a letter of undertaking from Zimbank to pay $800 000".

The purchaser, on the other hand, understood the phrase differently. He, as an employee of Zimbank, familiar with its policy regarding housing loans, would have made an application to the relevant branch of Zimbank and would have

been advised that his application was approved. The actual letter of undertaking, however, would only be given when transfer was tendered.

It seems to me that his interpretation is the more reasonable. If there is ambiguity, the *contra preferentem* rule would favour him. In other words, I conclude that the seller was wrong to expect, and demand, that a formal letter of undertaking be available within the thirty days. So long as he obtained the agreement of Zimbank to provide the letter of undertaking when requested by the conveyancers, and he obtained that agreement within thirty days, he complied with the terms of the agreement.

In fact, of course, he did not obtain it within the thirty days. But that was not fatal. Before the agreement could be cancelled, he had to be put on terms. And even before he was put on terms, he complied.

It follows therefore that the ultimatum of 4 March was based on a false premise, and was of no force or effect.

The learned judge in the court *a quo* did not deal with this aspect of the case. Her Ladyship disposed of the dispute by reference to a ground which had not been relied upon by the seller at all. This ground was the alleged inadequacy of the letter of undertaking.

The letter of undertaking from Zimbank was certainly curiously worded. The relevant part read as follows:

> "We hold at your disposal the undermentioned sum, which amount will be paid to you on the conditions enumerated below.
>
> Amount payable: $332 550.22 less interest at the rate of 25% per annum on the amount of $467 449.78 calculated from the 1st March 1999 to date of receipt of payment, both dates inclusive."

Her Ladyship took the view that this was not a letter of undertaking to pay $800 000, and on this view decided the case in favour of the seller.

I consider with respect that this was wrong. In the first place it was not a point which had been raised in the papers. The purchaser had therefore had no opportunity to deal with it. It was not the basis upon which the seller had purported to cancel the agreement. For that reason alone, it seems to me, the decision was wrong.

In the second place, if counsel had made the effort to ascertain the true facts from a practitioner involved in conveyancing, I suspect that an explanation would have been forthcoming. It is noteworthy that Kantor & Immerman, who represented the interests of the seller, accepted the letter of undertaking without hesitation.

I have no doubt that the reason for the curious wording was that there was an existing bond over the property in the sum of $467 449,78, which had to be cancelled, and upon which interest accrued at the rate of 25% per annum. Hence the seller's equitable interest, or net interest, in the property was as stated in the letter. There must have been another letter of undertaking addressed to the bondholder in respect of the sum of $467 449,78 plus interest, because Kantor & Immerman say, in

their letter of 27 April 1999 to the seller "Founders Building Society who have to cancel your bond kept us waiting for approximately two weeks before returning the Consent to Cancellation …".

The legal practitioners involved should have researched the facts. Had they done so, and put the result of their investigations before the court, I am sure that Her Ladyship would have come to a different conclusion.

In the result therefore I agree with the advice given to the seller by her legal practitioners. She was not entitled to cancel the agreement. The purchaser is entitled to enforce it.

I now have to consider why there was no appearance for the respondent (the seller) at the hearing of this appeal. We have proof that the notice of hearing was served on the respondent's legal practitioners, Messrs Madzivanzira & Partners, at 11.20 am on 6 June 2001. I am advised that the registrar of the Court was in touch with that firm by telephone about their failure to file heads of argument, and was told that they were considering renouncing agency. No notice of renunciation of agency is on record, nor has leave to renounce agency been sought in terms of Rule 12A of the Supreme Court Rules. No explanation has been forthcoming as to why, despite the suggestion of the registrar, there was no appearance at the hearing even to explain why they were not able to represent their client.

In the circumstances, the Court proposes to make an order that the legal practitioner concerned should personally pay the costs of the appeal which

would otherwise be payable by his client. However, in terms of Rule 12B(3) the legal practitioner will be given an opportunity to make representations as to whether or not the order should be made.

It is ordered therefore as follows:

"1. The appeal is allowed, with costs.

2. The question as to who is to be liable for the said costs will stand over for one month from the date of this judgment, at which time a final order as to costs will be made.

3. The order of the High Court dismissing the application with costs is set aside.

4. In its place the following order is made:

(a) The first respondent shall, within seven (7) days of service of this order upon her, instruct her legal practitioners to take all necessary steps to effect transfer of the immovable property, namely Stand No. 1915 Mabelreign Township situate in the district of Salisbury, commonly known as 3 Durweston Avenue, Cotswold Hills, Harare, to the applicant, against payment of the purchase price and costs of transfer by the latter.

(b) In the event of the first respondent failing to comply with paragraph (a) hereof, the Deputy Sheriff is hereby authorised to

sign all necessary documents required by the second respondent to effect transfer of the property to the applicant.

(c) The first respondent shall pay the costs of this application."

POSTEA (11 OCTOBER 2001):

The investigation into the question of costs in this matter, which were reserved in terms of the judgment, has uncovered a great deal of confusion, the net result of which has been to exonerate the legal practitioner who appeared for the respondent in the High Court, and to render virtually meaningless the victory of the appellant on appeal.

To begin with, it is now clear that Mr Musimwa, then working with Madzivanzira & Partners, at no stage had a mandate to act for the respondent in opposing the appeal. The notice of appeal was served on his then firm on or about 28 August 2000 and on 29 August he wrote to the appellant's lawyers to advise them that the property had already been resold to another purchaser, and therefore the appeal should be abandoned. It appears that the appellant's lawyers did not believe him and insisted on proceeding. (The Court queried this at the hearing and was advised there had been no transfer). In fact he was correct. The property had been resold, though he was not involved in the transfer. When they insisted on proceeding he wrote again on 12 October 2000, saying:

> "You are free to proceed with the appeal. However, be advised that we do not have the mandate to accept service of process from our client."

That letter was copied to the registrar of this Court.

In the circumstances, I do not see how any blame can attach to Mr Musimwa. The error lay with the appellant's legal practitioners, who continued, as did the registrar of this Court, to serve process on Madzivanzira & Partners, despite being told that he had no mandate.

The question of renouncing agency did not arise. There never was a mandate. The respondent decided to ignore the appeal, and not to instruct a legal practitioner. She was advised of the date of set-down and chose not to appear.

In the circumstances, the best way to achieve the desired result is to order that paragraph 2 of the order of this Court in civil judgment no. 61 of 2001 be deleted. It is so ordered.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Gill, Godlonton & Gerrans, appellant's legal practitioners

ADDENDUM TO JUDGMENT NO. S.C. 61/2001

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Please replace page 9 of Judgment No. S.C. 61/2001 with the attached pages 9 and 10.