REPORTABLE ZLR (45)

Judgment No. SC 54/09
Civil Appeal No. 278/08

SHETERAYI SEVY RUNATSA v

(1) RUMANI ESTATES (PRIVATE) LIMITED (2) REGISTRAR OF DEEDS (3) JOYSTONE INVESTMENTS TRUST

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, SANDURA JA & ZIYAMBI JA
HARARE, NOVEMBER 3, 2009

T S Manjengwa, for the appellant

C W Gumiro, for the first and third respondents

No appearance for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's court application for the specific performance of an Agreement of Sale concluded by the appellant and the first respondent on October 30, 2007. After hearing both counsel, we dismissed the appeal with costs and indicated that the reasons for that decision would be given in due course. I now set them out.

The background facts are as follows. On October 30, 2007 the first respondent and the appellant signed an Agreement of Sale ("the agreement"), in terms of

which the first respondent agreed to sell a certain piece of land ("the property") to the appellant for Z$2 800 000 000.00 (two billion and eight hundred million Zimbabwe dollars).

Clauses 2, 3 and 4.1 of the agreement read as follows:

> "2.
>
> The effective date of this agreement shall be the date of payment of the deposit by the purchaser in terms of paragraph 3 hereof.
>
> 3.
>
> (1) The purchase price for the property is the sum of $2 800 000 000.00 (two billion eight hundred million dollars) payable upon (the) signing of (the) Agreement of Sale.
>
> 4.
>
> 4.1 The seller shall tender transfer of the property to the purchaser within (14) fourteen working days of payment of the purchase price by the purchaser to Africa Real Estate, the seller's agents."

And clause 14 of the agreement reads as follows:

> "This agreement represents the entire contract between the parties. No purported amendment or waiver of or addition to any provision hereof or amendment or waiver of any notice given in terms hereof or collateral or replacement agreement in relation to the subject matter hereof shall be of any force unless and until reduced to writing in a document or series of documents, duly signed by the parties, each before 2 (two) witnesses."

After signing the agreement on October 30, 2007 the appellant could not pay the purchase price on that day, as she was required to do in terms of clause 3(1) of the agreement. She then approached Allen Manyunga ("Allen"), an estate agent

employed by Floburg Real Estate ("Floburg"), who had negotiated the sale of the property to her, and proposed payment of the purchase price in two instalments. Allen accepted the proposal, and gave the appellant Floburg's bank account details.

Thereafter, on November 9, 2007 the appellant transferred the first instalment of Z$1 200 000 000.00 to Floburg's bank account, and on November 20, 2007 she transferred the second instalment of Z$1 600 000 000.00 to the same account.

Subsequently, the appellant was advised telephonically by Floburg that the agreement had been cancelled because she had failed to pay the purchase price in terms of the agreement. The appellant then contacted a representative of the first respondent who confirmed the cancellation of the agreement, and advised her that the property had in fact been sold to the third respondent.

Aggrieved by what had happened, the appellant filed a court application in the High Court seeking an order compelling the first respondent to transfer the property to her. The application was subsequently dismissed with costs. Dissatisfied with that result, the appellant appealed to this Court.

In dismissing the application, the learned Judge in the court *a quo* said the following in his reconstructed *ex tempore* judgment:

> "… it is common cause that payments were made to Floburg Real Estate, long after the agreement had been signed, when in terms of clauses 3 and 4.1 of the agreement payment had to be made on signing the agreement to Africa Real

> Estate. In terms of paragraph 14 of the agreement, the agreement represents the entire agreement and cannot be altered without a written document signed by the parties.
>
> In this case the applicant made alternative arrangements for payments through Floburg and in two instalments without agreeing in writing with the first respondent. Therefore, the payments were not made to Africa Real Estate as required by clause 4.1 of the agreement. It was (*sic*) also not made on the date the agreement was signed as stipulated in clause 3. The applicant's payments were therefore not in terms of the agreement, and were not made at the time stipulated in the agreement and to the agent stipulated in the agreement. It cannot therefore be said that the applicant complied with the terms of the agreement. The agreement cannot be said to have come into effect as no payment has (had?) been made to the first respondent."

We entirely agree with the learned Judge.

In our view, clause 2 of the agreement, which deferred the commencement of the operation of the agreement until the date of the payment of the deposit by the appellant in terms of clause 3 of the agreement, introduced a condition precedent (which is also known as a suspensive condition) into the agreement. Although clause 2 refers to "payment of the deposit", it must be accepted that the parties meant "payment of the purchase price", because clause 3 does not mention the payment of the deposit, but simply states that the purchase price is payable upon the signing of the agreement.

In this case, the condition precedent to the coming into operation of the agreement was that the appellant paid the full purchase price to Africa Real Estate on the date of the signing of the agreement.

The essential question which arises in this appeal is whether the condition precedent was to be fulfilled in *forma specifica,* i.e. in the exact manner stated by the parties in the agreement, or *per aequipollens,* that is to say, in some equivalent manner. In our view, the answer to that question depends upon the intention of the parties as expressed in the agreement.

As VAN DEN HEEVER JA stated in *Frumer v Maitland* 1954 (3) SA 840 (AD) at 850 A-B:

> "Where the language is plain, I think, the golden canon of interpretation has been crisply stated by GREENBERG JA in *Worman v Hughes and Ors,* 1948 (3) SA 495 at p 505 (AD):
>
> > 'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.'
>
> From the nature of the function of a suspensive condition it seems to me that this rule should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract."

Applying the above principles to the agreement in question, there can be no doubt that the language used is plain, and that, therefore, the condition precedent had to be fulfilled *in forma specifica* before the agreement came into effect.

In this regard, it is pertinent to note that clause 14 of the agreement provides that the agreement represents the entire contract between the parties, and that no amendment, etcetera, shall be valid until reduced to writing and signed by the parties in the presence of two witnesses. It is significant that no such amendment of the agreement

was made by the parties. That, in our view, must be interpreted as an acknowledgement by the parties that the agreement was to be carried out in its original form.

Even if it were true that Allen authorised the appellant to pay the purchase price to Floburg in two instalments long after the agreement had been signed, Allen's actions would not bind the first respondent. We say so because the relationship between an estate agent and the prospective seller of immovable property is not the same as the relationship between an ordinary agent and his principal.

As Professor Christie puts it in his book *Business Law in Zimbabwe* 1 ed at p 336:

> "An estate agent is sometimes said not to be an agent at all, as he does not conclude a contract on behalf of his principal and does not undertake a mandate. This is true as far as it goes but … he is treated as an agent for some purposes. …
>
> His normal method of operation is to receive instructions from a prospective seller of immovable property and to endeavour to find a prospective buyer, whom he introduces to the seller. … Of course, there is nothing to prevent a seller instructing an estate agent to conclude the sale on his behalf, but the presumption that the ordinary relationship is intended is so strong that instructions to 'sell' or to 'go ahead and prepare the agreements to clinch the sale' will not be interpreted as authorising an estate agent to conclude the sale: *Guest and Tanner (Pvt) Ltd v Lynch* 1964 RLR 252 at 256-7."

Thus, the conclusion of a sale agreement on behalf of a prospective seller is not part of the estate agent's business, unless the estate agent is instructed by the prospective seller to conclude the sale agreement on his behalf.

That being so, an estate agent does not have the power or authority, in the usual course of his business as an estate agent, to amend an agreement concluded by a prospective seller and a prospective purchaser unless instructed to do so by the parties to the agreement.

Accordingly, Allen, who was not authorised by the first respondent to amend the agreement, did not have the power to authorise the performance of the agreement in a manner not provided for in the agreement. Consequently, the condition precedent set out earlier in this judgment was not fulfilled, and the agreement did not come into operation.

In the circumstances, the appeal was devoid of merit, and we dismissed it with costs.

CHIDYAUSIKU CJ: I agree

ZIYAMBI JA: I agree

Wintertons, appellant's legal practitioners

Mhiribidi, Ngarava & Moyo, first and third respondent's legal practitioners