Judgment No. HB 56/2004
Case No. HC 2010/02

SILITHENI DZVAIRO

Versus

CLEVER MANDIYA

IN THE HIGH COURT OF ZIMBABWE
CHIWESHE J
BULAWAYO 15 APRIL & 20 MAY 2004

Opposed Matter

CHIWESHE J: The applicant seeks an order declaring the agreement of sale entered into between herself and the respondent null and void. In the alternative she seeks that the same be deemed terminated by reason of breach by the respondent. The respondent maintains that the agreement is valid and binding and denies that he is in breach of any term.

The facts of this matter are as follows:

On 21 September 2001 the parties entered into a written agreement in which the applicant sold to the respondent her right, title and interest in stand number 73177 Lobengula West, Bulawayo. This property belonged to the applicant's late husband, and as such, was part of that deceased's estate. The applicant had been appointed executor at a properly constituted edict meeting although she still had to receive her letters of administration.

The respondents argue that because the letter of administration had not been processed, the applicant had no legal capacity to contract on behalf of the deceased's estate. In that contention the applicant is mistaken. The correct position is that the appointment of executor is deemed complete as soon as a person is named to that appointment at the first edict meeting. (See *Irelean Mamasubey* v *Master of the High Court and Richard Chimbari* HH 91/93). Accordingly I hold that the agreement of

sale was not null and void for the mere reason that the letters of administration had not been processed. It is sufficient that an appointment had been made at the edict meeting.

An examination of the contract indicates a glaring contradiction between clause 3 and clause 10, both of which deal with payment and the question of transfer. Clause 3 provides:

> "3. The balance of $110 000,00 shall be paid <u>after</u> the transfer of ownership." (Own underlining)

Clause 10 on the other hand provides as follows:

> "10. **<u>Transfer</u>**
>
> Transfer of the property to the purchaser shall be done upon the full payment of the purchase price. …"

It is an established rule of interpretation that in the event of a conflict, the latter provisions of an agreement must prevail over earlier ones. Therefore I hold that clause 10 of the agreement takes precedence over clause 3. I shall accordingly presume that transfer was intended to take place after payment of the full purchase price, that is, after payment of the balance of $110 000,00. This must have been the intention of the parties. The respondent for example did not insist that there be transfer before he meets his obligations *vis a vis* the outstanding balance. The qualifications embodied in clause 3(a) and clause 4 of the agreement are immaterial. In any event clause 4 appears to be a repetition of clause 3(a) – it is redundant and of no significance.

Clause 11 provides for breach. It reads in the operative part as follows:

> "If the purchaser fails to pay the purchase price in terms of clause 3 the seller shall be entitled to cancel the agreement upon one calendar month written notice to the purchaser …"

Clause 11 immediately comes after clause 10 which stipulates that transfer shall be effected after payment of the full purchase price. But the breach relates to clause 3 which stipulates different conditions which conditions I have ruled are overtaken by clause 10, a latter provision.

I find that the intention of the parties with respect the question of payment and transfer and the provisions for breach is not clear. It appears to me either the parties did not understand the purport of what they were trying to achieve or simply (as lay persons) borrowed phrases from precedent agreements and planted them wherever they did without regard to the overall meaning, interpretation and operation of the agreement. I do not think that the parties achieved consensus *ad idem* on a vital aspect of the agreement.

That as it may it appears to me that given the fact that the authors of the agreement of sale are lay persons, the agreement ought not to be sacrificed on the alter of technicalities. Equity demands that one looks at the overall object of the agreement. I have no doubt that despite its shortcomings the parties intended by this agreement that the house be sold to the respondent. The reason why the applicant wished to sell the house was because she needed money to finish her house at Pelandaba. A price was agreed upon. A substantial portion of that price was paid. The respondent was granted occupation – he still is in occupation. The applicant says she cancelled the agreement because a balance of $25 000,00 was owing. In my view the respondent had discharged his obligations to a substantial degree. The applicant was not entitled to cancel the agreement in the manner she purported to do. She

should have sued for the balance of the purchase price instead. Mr *Moyo-Majwabu* for the respondent says she was supposed to collect this balance from the respondent. It still awaits her.

In any event, assuming she had been so entitled to cancel the agreement, she is unable to show in the absence of proof of service or evidence that her letters of cancellation were indeed put into the post that such letters reached the respondent.

The probabilities indicate that the applicant has found another buyer willing to pay a higher price. Public policy demands that she honours her agreement with the respondent.

For these reasons it is ordered that the application be and is hereby dismissed with costs.

Samp Mlaudzi & Partners, applicant's legal practitioners
Messrs James, Moyo-Majwabu & Nyoni, respondent's legal practitioners