

HC 4167/02

ABEDNEGO SIBANDA

and

HELEN SIBANDA

versus

PENTAVILLE INVESTMENTS (PRIVATE) LIMITED

and

ORCHID REAL ESTATE

and

THE REGISTRAR OF DEEDS

HIGH COURT HARARE

MAKARAU J

13 November 2002 and 29 January 2003

Adv R Fitches for the applicant

Adv C Selemani for the 2nd respondent.

MAKARAU J: The concept of cluster homes on one piece of land in urban areas, held under sectional title, is now a part of the property scene in Zimbabwe. The concept is founded on the common law principle of joint ownership, where two or more persons jointly own a piece of land in undivided shares, each share carrying with it an exclusive right to occupy the land.

The applicants, who are spouses, are desirous of being owners of property under this concept. In pursuit of their desire, they entered into a written agreement with the first respondent in terms of which they purchased title in one such undivided share in land called Lot 599 Athlone Township, situate in the district of Salisbury. The purchase price of the undivided share in the land was agreed at \$500 000-00, which they paid in full. In addition to the agreement to purchase the land, the applicants also entered into an agreement for the construction of a housing unit on their undivided share. The two agreements were embodied in the same written agreement, under different headings. The full cost of construction of the housing unit was put in the agreement at \$3 500 000 – 00.

The second respondent brokered the agreement between the applicants and the first respondent and some of the payments under the agreement were to be made to it. In terms of the agreement, the first respondent was to transfer title in the undivided share in the land to the applicants within a reasonable time, provided the applicants had paid the purchase price in full and the final costs of construction of the housing unit had been secured.

By 11 December 2001, the applicants had paid not only the purchase price for the land in

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full but also the full costs of construction as stipulated in the agreement. On 19 December 2001, they received tender of transfer of the land from the first respondent's legal practitioners. They paid the necessary transfer fees, anticipating transfer. The first respondent's legal practitioners did not proceed with the transfer, citing the incomplete state of the housing unit as the impediment. The applicants then filed this application for an order compelling the first respondent to pass transfer of the undivided share of the land to them.

In opposition, the first respondent denied that the applicants are entitled to the relief sought on the basis that the full cost of the construction of the housing unit on the land had not been secured as it could only be ascertained after completion of construction. Since construction is still under way, transfer could not be effected.

The issue that falls for my determination is whether or not in terms of the agreement between the parties, the applicants are entitled to transfer of the land before the construction of the housing unit on the land is completed.

It was argued on behalf of the applicants that notwithstanding the provisions of clause 6 of the agreement, which governs transfer, the two agreements between the parties are severable. In this vein, it was further argued that the agreement of sale could be enforced on its own without invoking the provisions relating to the construction agreement. The applicants have sought to argue that having fully paid for the undivided share in the land, they are now entitled to transfer of that share.

I am inclined to agree with the applicants. It appears to me that a determination of this matter could lie in the determination of whether or not the written agreement between the applicants and the first respondent is a divisible contract.

It is a settled position in our law that a contract may be severed in a proper case. So settled is the position at law that in the case of *Middleton v Carr*,¹ Schreiner JA held at page 391 that

“there is no need to resort to the authorities to show that in a proper case the legal part of a contract may be treated as separate from the illegal part and be enforced.”

This principle was held in *Vernon and Others v Shoeman and Another*² be so firmly entrenched in our law that its correctness may hardly be questioned.

It would appear to me that the English courts have adopted the approach that a contract can be severed if the severed parts are independent of one another and can be severed without the severance affecting the meaning of the part remaining.³ The South African courts appear to have preferred the approach that seeks to have regard to the probable intention of the parties as it appears in, or, can be inferred from the terms of the contract as a whole.⁴

This rule on the severability of contracts has been of general application to save the legal provisions of a contract where the contract consists of several provisions some of which are illegal and others are

¹ 1949 (2) SA 374 (A).

² 1978 (2) SA 307 (D&CLD)

³ *Attwood v Lamont* 1920 3 KB 571.

⁴ *Vogel NO v Volksz* 1977 (1) SA 537 (T); *Sasfin (Pty) Ltd v Beuks* 1989 (1) SA 1; *Bobs Shoe Centre v Heneways Freight Services (Pty) Ltd* 1995 (2) SA 421 (AD) and *Collenv Rietfontein Engineering Works* 1948 (1) AD 413.

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not.⁵ While the rule has been developed mainly in cases where there is an illegality in the contract, the principle of severability has been extended to other cases where there is no illegality. Thus in the *Du Ploy* case, while recognising the general application of the principle in cases of illegality, the court applied the principle to hold that were clauses in an agreement were not so mutually dependent on each other that a clause could not be severed from the rest of the contract, that clause could be severed. Severability has been applied in cases where the provisions of the contract are not illegal per se but are contrary to public policy.⁶ In the case of *Bobs Shoe Center v Heneways Freight Services (Pty) Ltd* (supra), the court dealt with a situation where the contract was not illegal or void but could not be performed due to supervening impossibility. The court in that case held that it was dealing with a situation of divisible performance, to which the principles governing severability of an illegal or void provisions applied.

It is a matter of construction whether one part of a contract can be severed from the other. If the parts of the contract, shorn of one part, can stand and be enforceable on their own, then, generally, the contract could be severed. The overriding consideration in constructing a contract in this regard ought in my view, to be the intention of the parties when they entered into the contract. Thus, where the parties clearly intended that the contract be read and enforced as one, even if the different parts of the contract can stand alone, the court should give effect to the clear intention of the parties. I am persuaded to adopt this approach, as it does not violate the principle that the court should be very slow to make a contract of the parties. Borrowing from the language used in the case of *Sasfin v Beuks* (supra), it is my view that parties cannot enter into a contract that they then submit for judicial trimming and pruning before it can be enforceable if the result of the trimming and pruning is far removed from what they intended in the first place.

Applying the above to the facts of the application before me, I am of the view that the sale agreement of the undivided share of land can be severed from the construction agreement without affecting the meaning of either. This is so because the purchase price of the undivided share in the land is stipulated separately from the cost of the construction of a housing unit on the land. Separate prices create a very strong presumption in favour of severability⁷. The sale of the land can be complete on its own as a binding and valid contract. The sale of the share in the land is not suspended pending the construction of the housing unit. (The respondent has sought to argue that it is the transfer of the land sold that is conditional upon the payment or security of the full amount of construction costs.)

Accepting that the sale of the land is unconditional and is valid and binding, it

would appear that the applicants are entitled to the relief they seek as it is trite that the conclusion of a valid sale casts upon the seller the duty to deliver the merx sold unless the contract provides to the contrary.

I have also examined the law relating to the transfer of undivided shares in land to establish whether it provides that only those undivided shares, upon which the owner of the land has erected a dwelling, are transferable.

The law that governs sectional title as it is commonly referred to, or, transfer of undivided shares in land, as it should correctly be referred to, is contained in sections 25 to 27 of the Deeds Registries Act [Chapter 20.05]. The relevant section for the purposes of my inquiry is section 27 (1)(a), which provides as follows:

- “(1) Subject to the provisions of this section, if-
- (a) *the owner of a piece of land in an urban area wishes to transfer to one or more persons an undivided share in the land coupled with an exclusive right of*

⁵ *Du Ploy v Sasol Bedrly (EDMS)* 1988 (1) SA 438; *Bobs Shoe Centre v Heneways Freight Services (Pty) Ltd* (supra).

⁶ See *Sasfin v Beuks* (supra).

⁷ See *Collen v Rietfontein Engineering Works* (supra).

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occupation; or

(b)

the owner or owners, as the case may be, shall register against the title to the land concerned a notarial deed which-

- (i) *specifies the number of undivided shares created or to be created which will be coupled with an exclusive right of occupation and*
- (ii) *clearly indicates which buildings or portions of any building erected or to be erected on the land concerned, either with or without any area of ground, shall be subject to an exclusive right of occupation, and.....*
(The emphasis is mine).

Thus it is clear from the above that the erection of buildings on the land concerned is not a pre-requisite for the registration of a notarial agreement against the title to the land creating the undivided shares in land, coupled with a right of exclusive occupation. The creation of the shares by registered notarial deed is the only prerequisite to the transfer of such shares in terms of the law. In other words undivided shares of land on which no building has yet been erected can be transferred provided the shares have been created by the registration of a notarial deed in terms of S27 Act.

Section 27 further provides in s27 (4)© that the exclusive right of occupation that is coupled to an undivided share in land shall constitute a real right in the land concerned.

On the basis of the foregoing, I am of the view that the sale of an undivided share in land coupled with the right of exclusive occupation is no different from the sale of any other real right in land. I am of the further view that the purchase of the real right is and can be complete before any dwelling is erected on the share. It is on this basis that I was inclined that to agree with the applicants that the two agreements between them and the first respondent can be severed and exist independently.

I still have to proceed and determine whether the clear intention of the parties was that the entire agreement be read and enforced as one.

I read no such express intention in the agreement between the parties. I therefore have to infer the parties' intentions from the contract as a whole.

The contract between the parties involves two separate transactions with distinct obligations on the part of the parties in respect of each. The price for the land is

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separately stipulated from the cost of constructing the housing unit.

Further, the cost of construction does not become due and payable to the respondent upon the conclusion of the agreement of sale, as does the purchase price. In terms of the agreement between the parties, the respondents are to draw down the amounts per stage of development. In the event that the applicants fail to pay for any portion of the cost of construction, the respondent has the right to discontinue the construction work and claim damages from the applicants. The agreement does not give the respondent power to cancel the agreement of sale in the event that the purchaser fails to pay the costs of construction.

I have been persuaded further by the provisions of the addendum to the agreement between the parties to infer that the probable intention of the parties to be that ownership of the property could pass before the final costs of construction were ascertained. The addendum provides that the applicants could mortgage the property to raise the costs of construction of the housing unit. It is common cause that a mortgage bond can only be registered against title to a property owned by the mortgagor. Thus the parties agreed that the applicants could take transfer of the land prior to the completion of the construction of the housing unit on the land.

Taking the above factors into account, I am of the view that the parties' intention to be inferred from the agreement is that they did not intend that the agreement between them be read as indivisible. The obligations and performance under the contract of the parties in respect of each part of the agreement are not mutually dependent on each other. The applicants' performance in respect of each obligation is clear and a specific counter performance by the respondent can be allocated to each performance by the applicants. The applicants had to pay the purchase price of the land to complete the sale agreement. They have to pay the full costs of construction or the respondent will stop the construction works. Further, using the test of the officious bystander, that well known character in contract law, if he were to pose the question whether or not the parties intended that the applicants would not own the land they had purchased before a housing unit was fully constructed on the land by the respondent, in my view, the answer would clearly be: "No, of course not".

The inferred intention of the parties was for the applicants to separately purchase the land and pay for it in full and then have the land developed thereafter. It was the further inferred intention of the parties that the respondent had to be fully paid for the construction of the housing unit or to have such costs of such fully secured. I cannot infer an intention to suspend the passing of ownership in the land sold pending the completion of the construction works, the position advanced on behalf of the respondents.

Having come to the conclusion that the contract between the parties is divisible, I will not determine the question whether or not the applicants have not fulfilled the terms of the contract to entitle them to transfer. It is not necessary that I do so.

On the basis of the foregoing, I would find that the applicants are entitled to an order compelling the first respondent to pass transfer of the undivided share in the land.

Accordingly, the application is granted and the following order is made:

1. The first respondent is to pass transfer of one undivided share to the applicants

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within 14 days of this order failing which the deputy sheriff is hereby authorised to sign all the relevant documents on behalf of the first respondent.

2. The first respondent shall bear the applicant's costs.

Madhani and Associates, applicant's legal practitioners;
Zamchiya Costa, 1st and 2nd respondent's legal practitioners.