

RACHEL MEYERS N. O  
versus  
EDMOND MKARATIGWA  
and  
REGISTRAR OF DEEDS

HIGH OF ZIMBABWE COURT  
KARWI J  
HARARE, 21 October 2011

*D. Mbidzo*, for plaintiff.  
*S. Kampira*, for defendant.

### **Stated Case**

KARWI J: Parties to this matter agreed that the matter should proceed as a stated case. As a result they submitted a statement of agreed facts which as laid out the agreement and turn of events which led to the dispute in question. Parties further set out the issues which needed to be resolved in this matter.

The agreed facts are that on 22 October 2006 parties met at Quality Hotel in Harare and negotiated the sale of Stand 1048 Bannockburn Township of Stand 1 Bannockburn Township situate in the District of Salisbury (the property). Representatives of the plaintiff had previously viewed the property with the defendant's agent, one Pardon. After the terms were agreed, a representative of the plaintiff, one Rachel Meyers, along with Pardon and Daniel Mbizvo, attended at the plaintiff's offices. Plaintiff's employee delivered a copy of the title deeds of the property to Rachel Meyers and an agreement was drawn up at the plaintiff's offices. After completion of the agreement, Rachel Meyers, Pardon and Daniel Mbizvo followed the plaintiff's representative to Westgate where he was officiating at a wedding. Defendant explained that he was busy but the plaintiff insisted and as a result, the defendant quickly perused the agreement and noticed several discrepancies between what parties had been agreed and what had been written in the document. Defendant then insisted that a clause providing for payment by RTGS be included and the date of confirmation of the RTGS as well. As a result of this,

clause 14 was included to the effect that payment was to be made by 24 October 2006, failure of which the agreement would be regarded as null and void.

Defendant then requested the plaintiff to bring the agreement the next day, the 23<sup>rd</sup> October for his signature. Parties met on 23 October at Zesa in the afternoon. Defendant then indicated that his wife was not happy with the transaction and that she had found a buyer who was offering the price of \$60 000. Defendant indicated that he was in the process of divorcing his wife. A woman who was introduced as Mrs Mkaratigwa appeared and confirmed that she had a buyer who was offering \$60 000. She explained that her husband had not communicated that he had agreed with other people on the sale of the house. The message was communicated to Rachel Meyers who was seated in her car which was parked nearby. She declined to accept the change in prices and insisted that an agreement had been reached with the defendant. Defendant failed to sign the transfer documents and also failed to surrender the title deeds.

On the same day, the plaintiff caused its legal practitioner to write to defendant and to deliver a letter tendering payment of the purchase price against delivery of the signed Seller's declaration and Power of attorney to pass transfer. Despite this, the defendant refused, neglected and failed to sign the transfer documents and to deliver the original title deeds of the property.

Plaintiff contended that the defendant was required to sign documents of transfer and deliver the original title deeds to the conveyancer before the plaintiff could pay the purchase price in terms of clause 2 of the agreement of sale.

Defendant argues that the plaintiff was required to pay the purchase price first and then the defendant would sign and deliver the transfer documents and the original title deeds. Defendant further contends that because there was no confirmation of transfer of funds received by 24 October 2006, the agreement fell away.

Plaintiff counter argues that the defendant frustrated the fulfillment of that condition by failing to sign and deliver documents and original title deeds to the conveyancer. Furthermore, tendering of payment of the purchase price before 24 October 2006 was sufficient to fulfill the condition in clause 14 of the agreement.

The following points of law were placed before the court for determination;

- (a) Whether or not the plaintiff was required to pay the purchase price before  
The defendant signed the transfer documents and deliver the original title  
deeds to the conveyancer.
- (b) Whether failure to confirm RTGS by October 2006 rendered the agreement  
null and void.
- (c) Whether the plaintiff had suffered any damages in the alternative, if so, how  
much?

It is my considered view that this is a simple matter which should not have been brought to court had the parties taken a little time to look at their so called agreement. It seems to me that the parties were never at *ad idem* as regards the payment of the purchase price. Parties never reached any agreement on that score. The so called agreement was a record of the two parties' contrasting positions and not an agreement. The situation is understandable as the whole transaction appears to had been rushed, with each party pushing its position without agreeing at all on all the essential prerequisites of a valid contract being attended to. This is so because clauses 2 and 14 are contradictory, yet they should have been in tandem if an agreement was meant to be achieved. The draft version of the .agreement says that the purchase price shall be forty million dollars payable against transfer. And the amended version by the defendant, which amendment was effected at the wedding, was to the effect that delivery of the original title deeds and signature of the transfer documents by the seller was to be done by end of the day on Tuesday the 23<sup>rd</sup> of October, 2006. The amended clause 14 was to the effect that if confirmation of transfer of funds was not received by 24 October 2006, then the agreement would become null and void.

It seems to me that the amendments effected by the defendant clearly emphasized the need for payment to be effected first before he could sign any transfer documents, hence the amended clause 14 which required that confirmation of the transfer of funds be done first. On the other hand the plaintiff wanted transfer documents and surrender of the title deeds to be done first before actual payment was effected. The two positions are polls apart just as the parties' minds were polls apart on this very crucial issue. The two minds were therefore not *ad idem*. As a result I find that the two parties were not in

agreement. There was therefore no agreement to be enforced. It also follows that there were no damages suffered by any party following an attempt by the parties to reach an agreement. As a result, It is ordered that the claim by the plaintiff be and is hereby dismissed with costs.

*Mbidzo Muchadehama & Makoni*, plaintiff's legal practitioners

*Chinamasa, Mudimu, Chinongwenya & Dondo*, 1<sup>st</sup> defendant's legal practitioners