

DISTRIBUTABLE (20)

Judgment No. S.C. 2/02

Civil Appeal No. 209/00

(1) ERS INVESTMENTS (PRIVATE) LIMITED t/a ERS
REALTY
(2) WILLIAM HANLANI (3) KEITH MUNGOSHI
v PATIENCE MANDIZVIDZA

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JANUARY 17, 2002

J B Wood, for the appellants

L Mazonde, for the respondent

ZIYAMBI JA: The respondent, on 25 January 1999, entered into an agreement with the second appellant (“Hahlani”), through the first appellant, for the purchase of a vacant piece of land known as stand 796 Uplands, Waterfalls, Harare. It is common cause that the property was subdivided and no title deeds were available.

The material terms of the agreement were as follows:

“4. OCCUPATION:

- (a) The seller shall give vacant possession of the property hereby sold to the purchaser on the 1st of February 1999 or otherwise by mutual consent provided that the purchaser shall have complied with the provisions of section 12 of the General Conditions of Sale by that date and provided further that such vacant possession of the said property shall be subject to any leases or encumbrances to which the said property may be subject. ...

7. TRANSFER:

Transfer shall be effected by the seller's conveyancers and the purchaser shall, within a period of fourteen days, pay or furnish a Bank or Building Society Guarantee for payment of the purchase price against transfer. If such payment or guarantee shall not be furnished to the seller's conveyancers, the purchase price shall bear interest at 19% per annum from the expiry of such period of fourteen (14) days until transfer shall be effected. Should the purchaser fail within a period of fourteen (14) days to pay the costs of transfer and sign such documents as he may be required to sign to secure transfer, the purchase price shall bear interest aforesaid. The rights of the seller under this agreement shall not in any way be prejudiced by any extensions of time or any other indulgence or concession which the seller may grant to the purchaser in respect (of) performance of the purchaser's obligations under this agreement. ...

12. PAYMENT:

The purchase price shall be the sum of \$170 000.00 (one hundred and seventy thousand dollars).

PAYABLE AS FOLLOWS:

Terms of Payment

SPECIAL CONDITIONS:

This agreement is subject to and conditional upon:-

1. The purchaser being able to obtain a bond from Finhold within 28 (twenty-eight) days of signing hereof.
2. It is agreed that the land has been subdivided and as soon as the services are completed (i.e. water, roads and electricity – provisional date 30/06/99), the purchaser can proceed with developments on this stand while title deeds are being processed.
3. The seller undertakes to provide services with minimal delay. ERS Realty undertakes to take all reasonable and necessary measures to ensure that both parties have fulfilled their responsibilities.”

The respondent denied that in terms of the special conditions, the purchase price was to be secured by a loan provided by her employer (Finhold) within 28 days of her signature of the agreement. According to the respondent, she understood clause 7, as read with the rest of the agreement, to mean that payment of the purchase price or a guarantee for payment thereof was to be made by her within

fourteen days after transfer was tendered by Hahlani's legal practitioners. Accordingly, on 11 June 1999, about six months after the agreement of sale was concluded, her employer's legal practitioners wrote to Hahlani's legal practitioners about the need for simultaneous transfer and registration of the bond. No response was received.

Meanwhile, she had spent, so she averred, \$200 000 to purchase building materials, her intention being to erect on the stand a building, plans for which were approved by the City of Harare. She had also moved one of her workers onto the stand and erected a wooden cabin thereon. Accordingly, she was surprised to learn from a letter written to her by her employer that the stand in question had been sold to the respondent. She was not notified of any breach on her part as, she contended, is required by clause 10 of the agreement and Hahlani had proceeded to sell the property to the third respondent notwithstanding that the agreement of sale between her and Hahlani had not been cancelled. The third respondent had, since the purchase of the property, dug a well and put in a latrine on the stand and had threatened to forcefully evict the respondent's worker from the stand.

On those facts the High Court, on 25 August 1999, issued a provisional order in the following terms:

- “(a) That the purported agreement of sale in respect of stand 796 of stand 777 Midlands Township of subdivision E of subdivision A of Waterfalls entered into between the second and third respondents on 23 July 1999, through the agency of the first respondent, be and is hereby declared null and void;
- (b) That the agreement of sale in respect of the stand mentioned in paragraph (a)

hereof entered into between the applicant and the second respondent, through the agency of the first respondent, on 25 January 1999 is hereby declared to be binding between the parties to it.

(c) That the first, second and third respondents shall execute all documents and do all other acts necessary to transfer the ownership of stand 796 of stand 777 Midlands Township of subdivision E of subdivision A of Waterfalls to the applicant within seven days of being called upon to do so by the second respondent's conveyancers, failing which the Deputy Sheriff be and is hereby authorised to do so on their behalf.

(d) That the first, second and third respondents shall pay the costs of this application jointly and severally, the one paying the others to be absolved.

(e) The costs associated with the postponement of this matter on 30 May 2000 shall be paid by the applicant.”

The main ground of opposition advanced in the court *a quo*, and which did not find favour with the learned trial judge who confirmed the provisional order, was that the agreement was conditional upon the fulfilment of the special condition and that condition remained unfulfilled as the respondent had failed to provide payment or a guarantee thereof from her employer for the due payment of the purchase price in terms of the agreement. The appellants stressed in the court *a quo* that the idea behind the agreement was that the respondent would take occupation of the property as soon as payment of the purchase price had been made but before transfer was effected as there were no title deeds to the property in

question.

The learned trial judge took the view that the only clauses relevant for a determination of the matter were clauses 7 and 11 of the agreement. He also took the view that clause 7 was to be interpreted to mean that the purchase price was to be paid against transfer and within fourteen days of demand by the seller's conveyancers. The latter view was supported, he reasoned, by the fact that the purchase price would bear interest from the expiry of the fourteen day period up to the date of transfer.

Before us Mrs Wood, for the appellants, persisted in her submission, made in the court *a quo*, that the agreement never came into effect as it was subject to a condition precedent which suspended its operation pending fulfilment of the condition. Since there was no compliance with the condition precedent, it followed that the agreement of sale did not come into effect. She submitted further that since it was not disputed that the first appellant had made it clear that what was required was "cash up front" or an acceptable guarantee of payment, what was meant by the word "bond" was in fact a loan and that the loan had to be paid within 28 days.

It is clear from a reading of special condition 1 that the intention of the parties was that the operation of the entire agreement would be suspended pending the grant of a loan by Finhold to the respondent within 28 days of the date of signature of the agreement. The loan not having been granted within the stipulated time, the contract did not come into effect and accordingly no enforceable obligations arose from it. The respondent, in her founding affidavit, deals with the special conditions

referred to above in the following manner:

“To compound matters further there are three special conditions to the sale. The first is to the effect that I had to obtain a bond from my employer within 28 days of signature of the agreement. This special condition contradicts the provision in clause 7 which talks of 14 days unless clause 7 is meant to mean 14 days from the date upon which transfer is tendered.

10. The agreement provides for the giving of notice in writing to the defaulting party. Such notice was never posted to me ... after the expiry of 28 days from the date when I signed the agreement. I submit that I could not possibly have obtained a mortgage bond from my employer by the end of February 1999. This is because the ... respondents have not tendered transfer to me as the subdivisions are yet to be registered. Obviously, any mortgage bond would have to be registered simultaneously with transfer of the subdivision in question to me.”

The clear import of the agreement between the parties is that clause 7 was one of the terms of the contract which would come into effect upon the fulfillment of special condition 1 of the agreement. To attribute any other meaning to the agreement between the parties would be to ignore the intention of the parties as expressed by them in the agreement.

As to the “bond”, it was known by the respondent that there were no title deeds and that consequently a mortgage bond, to be registered simultaneously with the transfer could not possibly be obtained within 28 days. Accordingly, there is substance in the submission by Mrs Wood that it was a loan rather than a mortgage bond which was contemplated by the parties, such loan to be available within 28 days.

To borrow from the words of GREENLAND J in *Malaba v Takangovada* 1991 (1) ZLR 1 (HC) at page 6:

“... it is clear to me that (Clause 2) under the heading of "SPECIAL CONDITIONS" constitutes a condition precedent proper. The clauses under the

heading of "GENERAL CONDITIONS" constitute terms of the would be contract. These are the conclusions that must be reached in the light of the general lay-out of the agreement and the plain meaning of the words employed. In particular:

- (a) the words employed generally under and including the heading of ... "SPECIAL CONDITIONS" reveal a clear intention to suspend the operation of the sale contract and render its coming into being conditional on (the) applicant, as purchaser, securing a loan in order to finance the purchase price ...".

The actions of the respondent, as revealed from an extract from the message book of the first appellant, (Annexure A to the opposing affidavit) are consistent with this interpretation, namely, that payment was required within the 28 days stipulated in the special conditions. The message which she left at the first appellant's offices on 2 March, the last date for payment, was that the cheque would be ready the following day. A further message left on 5 March indicated that 'personnel' had not finished processing but that she would telephone later to advise the first appellant of "the progress". The messages, the existence of which was not challenged, are, in my view, inconsistent with her assertion that payment was to be made against transfer of the property to her. On the contrary they point to the fact that the respondent was endeavouring to raise the purchase price within the time limit imposed by special condition 1 of the agreement.

Accordingly, the appeal is allowed with costs. Paragraph 1 of the order of the High Court is set aside and the following substituted:

"The provisional order is discharged with costs".

CHIDYAUSIKU CJ: I agree.

CHEDA JA: I agree.

Byron Venturas & Partners, appellants' legal practitioners

Musunga & Associates, respondent's legal practitioners