Civ. Appeal No. SC 205/02

REPORTABLE (ZLR) - 11

ANDREW DUNCAN BARKER v

(1) AFRICAN HOMESTEADS TOURING AND SAFARIS (PVT) LTD
(2) REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, 9 JUNE & JULY 7, 2003

E W W Morris, for the appellant

A P de Bourbon, SC, with him *P Nherere*, for the first respondent

No appearance for second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which confirmed a provisional order granted in favour of the first respondent and interdicting the appellant from selling or transferring his immovable property situate in Harare ("the property") to anyone other than the first respondent.

The factual background is as follows. The appellant ("Barker"), who, at the relevant time, had emigrated to Australia, is the registered owner of the property. After emigrating, he instructed his Estate Agents, Robert Root & Co (Pvt) Ltd ("Robert Root") to sell the property on his behalf.

In June 2001, Mr Robert Bailey ("Bailey"), a director of the first respondent ("African Homesteads"), contacted Robert Root and spoke to Mr Patrick Kennan ("Kennan") and Mrs Pat Brogan ("Brogan"). He informed them that he was interested in purchasing the property through one of his companies which he later specifically identified as African Homesteads. However, according to Barker the first time he knew that the prospective purchaser was African Homesteads was

when he received the draft Agreement of Sale on 28 June 2001. Before that date, he was under the impression that the prospective purchaser was Bailey.

Nevertheless, on 12 June 2001 Bailey made a specific offer by e-mail to Robert Root to purchase the property for Z$20 000 000. On the same day, Robert Root, by e-mail, acknowledged receipt of Bailey's offer.

Two days later, on 14 June 2001, Bailey by e-mail confirmed his earlier offer and indicated that it would lapse at 3 p.m. on 25 June 2001.

Following further discussions between Bailey and Brogan during the following week, Bailey sent another e-mail to Robert Root on 22 June 2001 confirming what he had said on 14 June 2001 and requesting Robert Root to urgently advise Barker of the finality of the offer.

Three days later, on 25 June 2001, Bailey received a telephone call from Barker, who was calling from Australia, indicating that he had been notified of the offer and was keen to accept it but required an extension of the deadline by twenty four hours. The requested extension was granted. It was also agreed that Bailey would pay to Barker in Australia US$32 500,00 in respect of Z$5 000 000,00 of the purchase price of $20 000 000. In other words, part of the purchase price was to be paid in Australia in United States dollars, and the other part, i.e. Z$15 000 000.00, was to be paid in Zimbabwe.

On the following day, 26 June 2001, Barker telephoned Bailey from Australia advising him that he was accepting his offer to purchase the property, and that he would confirm his acceptance of the offer with Robert Root. This is, however, denied by Barker. Nevertheless, on the same day Bailey, after the telephone conversation with Barker, contacted Robert Root and spoke to Kennan who informed him that he had been contacted by Barker and that Barker had confirmed his acceptance of the offer. Barker had also instructed Kennan to draft the Agreement of Sale.

Subsequently, the Agreement of Sale was drafted by Kennan and e-mailed to Barker on 28 June 2001. Thereafter, on l July 2001 Barker responded by e-mail advising that he had received the Agreement of Sale, that it looked in order, that he was sending a copy of the Agreement to Mr. Tim Johnson ("Johnson") for perusal, and that if Johnson was happy with it Robert Root should sign it on his behalf.

Eight days later, on 9 July 2001, Bailey received a telephone call from Robert Root informing him that Barker had decided to sell the property to someone else at a better price.

In the circumstances, African Homesteads filed an urgent chamber application in the High Court seeking a provisional order and an interim interdict restraining Barker from selling the property to anyone other than African Homesteads. The order sought was granted on 19 July, 2001, and was subsequently confirmed by the High Court on 19 June 2002. Aggrieved+ by the result, Barker appealed to this Court.

Although Barker relies upon a number of grounds set out in his notice of appeal, in my view, this appeal can be disposed of on the basis of one of those grounds, which is that the alleged oral agreement relied upon by African Homesteads was illegal and unenforceable. That is so because in terms of s.11(1) of the Exchange Control Regulations, 1996 ("the Regulations"), published in Statutory Instrument 109 of 1996, African Homesteads could not make any payment outside Zimbabwe, nor could it incur any obligation to make a payment outside Zimbabwe, unless it had been authorized to do so by the exchange control authority.

Subsections (1) and (2) of section ll of the Regulations read as follows –

> "(1) Subject to subsection (2), unless otherwise authorized by an exchange control authority, no Zimbabwean resident shall –

(a) make any payment outside Zimbabwe; or

(b) incur any obligation to make a payment outside Zimbabwe.

(2) Subsection (1) shall not apply to –

(a) any act done by an individual with free funds which were available to him at the time of the act concerned; or

(b) any lawful transaction with money in a foreign currency account".

The term "free funds" is defined in s 2 of the Regulations as:

"money which is lawfully held outside Zimbabwe by a Zimbabwean resident and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe".

In my view, there is no doubt that in terms of the alleged oral agreement African Homesteads incurred an obligation to pay to Barker, a foreign resident, the sum of Z$15 000 000.00 in Zimbabwe, and the sum of US$32 500,00 in Australia.

Whilst the agreement to pay Z$15 000 000,00 to or for the credit of Barker in Zimbabwe would not be unlawful, the actual payment would be unlawful unless authorised by the exchange control authority. That is so because of the wording of s.10(1)(a) of the Regulations which reads as follows :

"Unless otherwise authorised by an exchange control authority, no person shall, in Zimbabwe –

(a) make any payment to or for the credit of a foreign resident".

However, payments and agreements to make payment outside Zimbabwe stand on a different footing. That is so because in terms of s 11(1)(a) and (b) of the Regulations, as read with s 11(2), both the actual payment and the

agreement to make payment outside Zimbabwe require authorization by the exchange control authority, except where the act is done by an individual (as opposed to a company, for example) with free funds available to him at the time of the act concerned.

The difference between s 10(1) and s 11(1) of the Regulations was stated by this Court in *Macape (Pty) Ltd* v *Executrix, Estate Forrester* 1991 (1) ZLR 315 (S) at 320 B-D where McNALLY JA said –

> "The essential point to be noted is that there is a clear difference between ss 7 (now s.10) and 8 (now s.11).The former proscribes only the actual payment. The latter proscribes both the payment and the underlying agreement to pay.
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> In other words, when one is concerned with payments inside Zimbabwe it is perfectly lawful to enter into the agreement to pay. But, without authority from the Reserve Bank, the actual payment may not be made. By contrast, when dealing with payments outside Zimbabwe, it is unlawful even to enter into the agreement to pay, without first obtaining the authority of the Minister, whose powers have been delegated to the Reserve Bank".

More recently, in *International Who's Who Ltd* v *Bernstein Clothing (Pvt) Ltd* SC 28/99 (unreported), this Court considered the effect of failing to comply with the provisions of s 8 of the Exchange Control Regulations, 1977 (now s 11 of the Regulations). The facts in that case were these. The appellant was a company registered in England, and the respondent company was registered in Zimbabwe. On 16 November 1995 the appellant and the respondent concluded an agreement in terms of which the appellant was to place two one-page entries in its directory, advertising the respondent's business. The respondent was to pay a fee of 20 540 Swiss francs in South Africa for onward transmission to Switzerland. Later that day the respondent purported to cancel the contract, but the appellant was not prepared to accept the cancellation, and proceeded to publish the entries in its directory as agreed earlier.

Subsequently, the appellant instituted legal proceedings against the respondent in the High Court claiming payment in terms of the agreement. At the hearing of the matter the High Court

upheld a point *in limine* taken by the respondent and dismissed the claim with costs. The point *in limine* was that as the agreement to make payment outside Zimbabwe had not been authorized by the exchange control authority, as required by s.8(1)(a)(ii) of the Exchange Control Regulations, 1977 (now s.11(1)(b) of the Regulations), it was illegal and unenforceable. A subsequent appeal to this court was dismissed with costs.

In the present case, as the alleged agreement to pay the sum of US$32 500.00 to Barker in Australia had not been authorised by the exchange control authority, *cadit quaestio*. That is the end of the matter. The agreement is illegal and unenforceable. In addition, there is no question of the terms of payment of the purchase price of Z$20 000 000,00 being severable.

In the circumstances, the appeal is allowed with costs, which costs shall be paid by the first respondent. The order issued by the court *a quo* is set aside and the following is substituted :

"The provisional order issued by the High Court on 19 July 2001 is discharged with costs".

ZIYAMBI JA: I agree.

MALABA JA: I agree.

Wintertons, appellant's legal practitioners

Coghlan, Welsh & Guest, first respondent's legal practitioners