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Judgment No. SC 10/04

Civil Appeal No. 381/02

NYIKA ENGINEERING (PRIVATE) LIMITED

v FRANCISCA MUSHORIWA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE, FEBRUARY 9 & MARCH 2, 2004

O Mushuma, for the appellant

B Mujeyi, for the respondent

MALABA JA: This is an appeal against an order of the High Court granted on 24 October 2002 directing the appellant ("Nyika Engineering") to transfer into the respondent's name Stand No. 13 of Lot 7 of Good Hope, Mount Hampden ("the property") within ten days thereof, failing which to pay to her the equivalent value of the property within fifteen days of the evaluation assessed by an estate agent appointed by the registrar of the High Court. The appeal is against the alternative part of the order of the court *a quo* directing Nyika Engineering to pay the respondent the assessed value of the property as its equivalent. The contention is that the court *a quo* had no legal basis for granting the respondent a relief of that nature because she had not claimed cancellation of the contract of sale, nor was evidence on the *quantum* of damages represented by the amount of the value adduced.

What happened is this. On 29 June 1999 Nyika Engineering, a body corporate, was represented by its managing director, Charles Mudimu, when it entered into a written agreement with the respondent in terms of which it sold to her the property for $184 000. She paid the purchase price in full the same day. From that day up until the order was made against it Nyika Engineering failed to honour its contractual obligation to transfer the property into the respondent's name.

On 22 July 2002 the respondent instituted an action in which she claimed an order for transfer of the property against Nyika Engineering. At the hearing of the matter it was common cause that Nyika Engineering had failed to honour its contractual obligation to the respondent for three years despite the fact that it still professed its willingness to transfer the property into her name. It alleged that its failure to do so had been caused by its erstwhile legal practitioners, Manase & Manase. With the consent of the legal practitioners for both parties, the learned judge who was hearing the matter asked Nyika Engineering's legal practitioners to check with the Deeds Registry as to whether the property in question was still available for transfer into the respondent's name, as the complaint was that Manase & Manase had been transferring stands belonging to Nyika Engineering without its knowledge. The investigation revealed that the property sold to the respondent was in the process of being transferred to a third party.

In the light of this new development the respondent's legal practitioners applied for an amendment to her claim to add the alternative terms for the payment of the equivalent value of the property in the event of Nyika Engineering failing to transfer the property itself. Nyika Engineering had submissions made on its behalf on the matter by its legal practitioners. At the close of submissions by both parties the learned judge *a quo* granted the application and had the claim amended to include a prayer for an order for the payment of the equivalent value of the property failing transfer of it by Nyika Engineering.

A purchaser of property can sue for its delivery or alternatively payment of its value. In that event, the purchaser has to prove no more than that he is entitled to delivery, and if the seller cannot deliver the purchaser is entitled to an order for the payment of its equivalent value as long as it is known at the time the order is made or is easily ascertainable. It has been the practice of courts to grant such alternative claims for payment of the value of property in the event of failure by

the seller to deliver the property itself. The two remedies are regarded as alternative terms of the same relief provided entitlement to the property itself is not in issue. See *Vulcan Rubber Works (Pty) Ltd v SAR & H* 1958 (3) SA 285 (A) at 289 D-E; *Standwin Investments (Pvt) Ltd v Helfer (SR)* 1961 R & N 679.

Nyika Engineering did not deny that the respondent was entitled to delivery of the property by means of transfer into her name. It always promised to do everything possible to transfer the property into her name so that its indebtedness in that sense was fully acknowledged. The obligation to pay the equivalent value of the property was predicated upon its failure to comply with the order of delivery of the property and as such there was no need for the respondent to first allege cancellation of the contract of sale to be entitled to such an alternative term of the same relief. My view is that in the circumstances of this case it was in the nature of justice that such a relief be granted to the respondent. The order had built into it a mechanism by which the value of the property could easily be ascertained.

I see no merit in the appeal. It is accordingly dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Hove, Lemani & Associates, appellant's legal practitioners

Gollop & Blank, respondent's legal practitioners