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Judgment No. SC. 65/06
Civil Application No 214/06

SEMUKELISO GONO v TRUSTEES OF THE ZIMBABWE WEST ANNUAL CONFERENCE OF THE UNITED METHODIST CHURCH (INNERCITY) MASVINGO

SUPREME COURT OF ZIMBABWE
HARARE, NOVEMBER 8, 2006 & JANUARY 24, 2007

M V Chizodza-Chineunye, for the applicant

J M Mafusire, for the respondent

Before: GWAUNZA JA, In Chambers in terms of r 34(5) of the Supreme Court Rules

This is an application for the reinstatement of an appeal deemed to have lapsed by operation of law.

On 21 June 2006 the High Court granted an application by the respondents *in casu,* for summary judgement against the applicant. The applicant, through her erstwhile legal practitioner, Peter Matsavura, filed a notice of appeal against the judgment on 22 June 2006. Thereafter, the applicant failed to deposit with the Registrar of the High Court the estimated cost of the preparation of the record, nor did her legal practitioner make a written undertaking to pay such costs, as required

by r 34 of the Rules of this Court. Neither the applicant, in her founding affidavit, nor her then legal practitioner, in his supporting affidavit, have given a satisfactory explanation as to why the money was not deposited, nor the undertaking in question made to the registrar. The applicant's position is that she expected her legal practitioner to attend to the matter, while the latter simply avers that the fees for preparing the record of proceedings were not paid within the stipulated time due to an "oversight" on his part. He then goes on to "beg the indulgence" of the Court so that the appeal can be heard.

I do not find the explanation tendered for the default in question to be reasonable. Legal practitioners are expected to be acquainted with the Rules of the Court, and to abide by them. They should not do their clients a disservice by "overlooking" important requirements under the Rules of the Court. For her part the applicant has not said anything about what she has done to remedy the default in question. Whole apparently blaming her erstwhile legal practitioner, she has not indicated whether or not she has since paid the costs in question or made the relevant written undertaking. This attitude, in my view, evinces a lack of respect for the Rules of the Court, and casts some

doubt on the applicant's *bona fides* in making this application.

Having failed to satisfy the Court that she has a good explanation for the default in question, the applicant's burden of showing that the prospects of success on the merits of her appeal are good, in my view, becomes that much greater.

The applicant's claim against the respondent, as has already been indicated, was dismissed by way of a summary judgment against her. This means that, in the view of the learned Judge *a quo*, the applicant's case, on the papers, disclosed no good defence to the respondent's claim. It is important to keep this background in mind in considering the applicant's prospects of success on appeal.

The applicant and the respondent on 1 December 2004 entered into an agreement for the sale and purchase, respectively, of certain immovable property belonging to the applicant.

In terms of that agreement the respondent paid a deposit of $40 million towards the purchase price, and was to immediately apply to Central African Building

Society (“CABS”) for the balance of $60 million. The respondent was also required to submit written confirmation from the Society that such loan had been granted and accepted by the purchaser. The respondent was required to then deliver bank guarantees, and letters of undertaking from CABS for the total amount of the loan required, to the seller’s conveyancers. These actions were to be taken within ten days of the signing of the agreement of sale. The agreement of sale also provided in its para 8(3) that, in the event of the failure by the purchaser to comply with these requirements within the ten days, the agreement would be terminated with effect from the end of that period.

The respondent did not secure the loan within the stipulated period, a circumstance that rendered it unable to comply with the consequent requirements stipulated in the agreement. This led to the agreement lapsing.

The learned Judge *a quo* found that the parties subsequently entered into negotiations which, on the papers, amounted to revival of the lapsed agreement, albeit with some variations. In particular, the applicant on 8 February 2005 addressed a letter to the

estate agent handling the sale, which, significantly, read in part as follows:

> "My appeal to your good office is to relay my concerns to the purchaser and also find out whether they are still interested in the property. If they are still interested in the property can they top up by $30 million and also settle the balance by 28 February 2005."

The court *a quo* correctly noted that the only balance outstanding at that time was the $60 million that the respondent had applied for from CABS. The applicant's proposal was grudgingly accepted by the respondent, leading to the signing, by the parties, of an agreement on 21 April 2005 stating that of the $30 million, $15 million would be paid directly to ZIMRA towards capital gains tax and the balance was to be "payable" by 31 July 2005.

It is not disputed that $15 million was duly paid to ZIMRA on 27 April 2005. Without making specific reference to the other $15 million, the learned Judge *a quo* noted that there was no dispute regarding the rendering of the sum of $30 million. He also found that the grant of the facility in respect of $60 million had been secured by 24 February 2005, and accepted for the applicant by her lawyers on 3 March 2005.

The applicant contends in the absence of proof to that effect, that in addition to her proposal for the payment of the additional $30 million, she had indicated she wanted payment of $60 million to be effected by 28 February 2005 into her account. The paragraph containing the proposal referred to has been quoted above, and it clearly makes no reference to payment being made directly into her account. The payment was, in fact, and as would have been expected in the absence of a specific direction to the contrary, paid to the applicant's estate agent by CABS' lawyers.

Even though the applicant expressed frustration at the delays in the procuring of the loan of $65 million and the payment to her of such money, she went on to sign the documents necessary for transfer of the property into the name of the respondent. The transfer was registered on 9 May 2005. Two months later, on 1 July 2005, the CABS Bond for $60 million was registered. The amount was thereafter forwarded to the applicant's representatives for onward transmission to her. There is, in my view, merit in the respondent's submission that the applicant's refusal to thereafter accept the payment of $60 million from her agents had no effect on the respondent's title to the property.

It is evident from the evidence before the Court that the parties suffered frustration of varying degrees following the signing of the original agreement of sale and the subsequent negotiations between them. Each party has levelled accusations against the other for breaching or not complying with the terms of the agreements. Despite these grievances, however, it is evident that the following facts stand out and cannot be denied –

(i) The respondent failed to secure the loan of $60 million by the stipulated date, leading to the lapse of the original agreement between the parties.

(ii) Subsequent dealings between the parties led to a revival, with some modification, of the original agreement.

(iii In terms of the revived agreement, the applicant requested a “top up” of $30 million, which the court *a quo* found was duly paid.

(iv) The applicant signed all the necessary documents for transfer of the property to

be effected into the respondent's name, including a power of attorney to pass transfer. Transfer was duly effected.

(v) The $60 million was also secured and a Mortgage Bond registered against the title deed in favour of the respondent.

(vi) The $60 million was paid, not directly into the applicant's account, but, in my view, properly, to her chosen representatives.

The court *a quo* correctly found, against this background, that the respondent, as the registered owner of the property, was entitled to exercise rights flowing from ownership. These included the right to seek the eviction of the applicant and all those claiming occupation through her, from the property in question.

I am satisfied the applicant has no prospects of success on appeal.

The application accordingly fails.

In the result, the application is dismissed with costs.

M V Chizodza-Chineunye, applicant’s legal practitioners

Scanlen & Holderness, respondent's legal practitioners