LEONA PONA

versus

GODFREY CHIYUNGU MLAMBO

and

ROSINA MLAMBO

HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 15 MARCH & 23 MAY 2002

S P Finch for the applicant
Dondo for the respondents

CHEDA J: This is an application to compel respondents to transfer a certain piece of land being lot 4 of lot 35B Burnside in the District of Bulawayo and known as 6 Northway Burnside, Bulawayo (hereinafter referred to as "the property").

Applicant entered into a written agreement of sale of the said "property" with the respondents on 25 October 2000. The purchase price of the property was $1,2m and payment of the purchase price was to be made in the following terms:

(a) A deposit of $150 000 payable to respondents' agents, Messrs Alexander Court (Private) Ltd (hereinafter referred to as Alexander Court") upon signing of the agreement of sale.
(b) The balance of $1 050 000 payable to the seller's conveyancers from the proceeds realised from the sale of No. 32 Northway Burnside, Bulawayo (purchaser's property).

The said agreement of sale had a provision to cater for any breach by either party.

Paragraph 8 is the Breach Clause and reads:

Should either party commit a breach of this agreement and fail to remedy the same within fourteen(14) days of written notice to do so then:

(a) if it is the purchaser who is in default, seller shall have the right to either cancel this agreement and claim damages or alternatively to enforce it and claim interest, calculated on the full balance of the purchase price

then outstanding at the annual rate then in force as the Reserve Bank re-discounted rate, for the period of the default. In addition to any occupation rent which the purchaser is obliged to pay.

Payment of $150 000 was duly made to Alexander Court on the day of signing of the agreement. After the sale agreement had been signed, respondents surrendered the title deeds of "the property" to the conveyancers Messrs Ben Baron & Partners to transfer "the property" after the purchaser had fully paid the purchase price. According to 1st respondent's affidavit, he together, with 2nd respondent left for the United States of America and upon his return on 2 February 2001 he discovered that applicant had not yet disposed of her house and therefore had not been able to raise the balance of the purchase price.

First respondent then instructed "Alexander Court" to remove "the property" from the market and at the same time advised the applicant of the cancellation of the agreement of sale by reasons of applicant's failure to dispose of her property and pay the balance of the purchase price in time. "Alexander Court" however, delayed in carrying out 1st respondent's instructions and only did so by a letter on 23 April 2001 to Ben Baron & Partners. Sometime in March 2001 1st respondent went to see applicant and he discussed "the property" issue and verbally notified her of the cancellation of the agreement of sale.

On 25 July 2001 applicant's legal practitioners wrote a letter to respondents challenging the cancellation of the agreement of sale and referred to the letter of 23 April 2001. This was three months after applicant had had knowledge of respondent's stance towards the sale agreement. On 13 June 2001 applicant had secured a bond of

$900 000 towards the purchase of "the property" in dispute.

Applicant contends that she has not breached the agreement of sale because there was no time limit for her to raise the balance and also that even if respondents were of the view that she had breached the agreement they had not complied with clause 8(a) of the agreement, namely the need for a written notice to her about the breach.

On the other hand respondents contend that they complied with clause 8 (a) by instructing their Agents to do so. There is no doubt that applicant was duly notified of the cancellation hence the letter from her legal practitioners of 25 July 2001, despite the fact that it was written after 3 months and that applicant went ahead and secured a loan of $900 000 which for all intents and purposes was not in compliance with paragraph (b) of the terms of payment namely that she should pay the balance of $1 050 000,00 realised from the sale of No. 32 Northway, Burnside, Bulawayo.

At the hearing respondents' legal practitioner Mr Dondo raised a point in limine being that the application being brought before the court by the applicant was premature as she had not proved that she had paid the full purchase price. What is before the court was proof of a bond of $900 000 granted to her by CABS, this means a balance of $150 000 which she states, that at the time when this application was filed with this court on 21 September 2001 and again when it was heard on 15 March 2002 i.e. a period of 6 months plus, she had not paid the balance as per agreement.

The question to be determined by this court is whether or not applicant is entitled to the relief she is seeking. To determine this question it is essential to

examine her position in relation to the discharge of her obligation in a reciprocal contract.

Applicant's contention is that respondent's cancellation of the contract was unlawful as they did not notify her in writing as per the agreement of sale. To consider this argument, will be to delve into the merits, thus ignoring the topical issue being the point raised in limine. It is not in dispute that applicant has not performed her part of the contract which, in my view her performance is a condition precedent to the transfer of the property to herself. As long as it is proved that applicant has not fully complied with the terms and condition of the same contract she now seeks to enforce she cannot succeed in her application.

The argument raised by respondents has merit and applicant indeed has to perform her part first before she calls upon the courts to assist her. In my view applicant has no serious intentions of honestly performing her part of the contract in view of the time she has taken to attempt to secure funds for the fulfillment of this contract. It is a recognised principle of our law that the seller is entitled to demand proof of payment from the purchaser before transfer of his title to his property is taken away from him. A debtor's obligation is not discharged unless he can show that he has made payment to a person recognised by law as competent to receive the payment in discharge of his obligation. See Harrismith Board of Executors v Odendaal 1923 AD 530 at 539.

The applicant's future to discharge her duty to the respondents, in my view, entitles the respondents to refuse to pass transfer as they are also protected by the

same terms and conditions of the said contract which she now attempts to enforce against them.

The mere fact that applicant has been granted a bond by CABS which bond is yet to be registered is not proof of payment. In addition the said bond is insufficient to fully discharge her duty towards respondents. I hold the view that this application is therefore premature and ill conceived. It is a brazen abuse of the legal system.

Accordingly the application is dismissed with costs and there is no need to go into the merits.

Webb,Low & Barry applicant's legal practitioners
Chinamasa, Mudimu & Chinogwenya responents' legal practitioners