TONY TATENDA MASHAVA
versus
SHAW CECILE MASUKA
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE 25, 26 & 31 October 2018

Opposed Application

E Jera for the applicant
N Mupure for the respondent

CHIRAWU-MUGOMBA J: The background to this matter is as follows: - The applicant entered into an agreement of sale with the first respondent in respect of an immovable property being an undivided 3.14690411% share being share number 18 in certain piece of land situate in the district of Salisbury called stand 1282 Salisbury township measuring 892 square metres held under Deed of Transfer Number 2538/2017. The agreement was signed by the applicant on 22 August 2017 and by the first respondent on 27 August 2017. The purchase price was the sum of $35 000 which was to be paid in full by way of an N.M.B mortgage bond. The applicant secured the mortgage finance on 24 October 2017. On 20 December 2017, the applicant's bank account was debited with the sum of $2730 being transfer fees payable to Mupindu Legal Practitioners, the conveyancers. On the same date, the sum of $1918 was debited from the applicant's account being mortgage registration fees payable to V.S Nyangulu Legal Practitioners. On 24 October 2017, the applicant paid the sum of $300 to Rawson Properties, the Estate agents for the preparation of the agreement of sale. Despite making all payments, when the applicant approached the 1st respondent for the transfer including ZIMRA interviews, he refused to cooperate and stated that he wanted part of the purchase price to be paid in cash. This was also confirmed by Rawson Properties.

To that end, the applicant seeks the following order:-

1. That the 1st respondent has truly and legally sold to the applicant an undivided 3.14690411% share being share number 18 in certain piece of land situate in the

district of Salisbury called stand 1282 Salisbury township measuring 892 square metres held under Deed of Transfer Number 2538/2017.

2. That the 1st respondent be and is hereby ordered and directed to sign all the necessary papers and documents and attend to all the relevant offices to transfer into the applicant's name the immovable property being an undivided 3.14690411% share being share number 18 in certain piece of land situate in the district of Salisbury called stand 1282 Salisbury township measuring 892 square metres held under Deed of Transfer Number 2538/2017 within ten (10) days of the service of the order of this court.
3. In the event that the 1st respondent does not transfer the property within ten days as specified herein, the Sheriff of the High Court be authorised and directed to sign all the necessary papers to effect the transfer in question into the applicant's name.
4. That Messrs Moyo and Jera Legal Practitioners shall handle the transfer of the property in question from the 1st respondent's name into the applicant's name.
5. That the 1st respondent shall pay the costs of suit on an attorney and client scale.

In response, the first respondent avers as follows: - He does not dispute that he entered into an agreement of sale with the applicant. However, the applicant breached a material condition in clause 14. This condition was not fulfilled within a period of 21 days and an additional 7 days grace period. To that extent, the agreement became null and void. He advised the applicant that he could not attend to ZIMRA interviews in view of the agreement being null and void. If the applicant was still interested, they would have to enter into a new agreement. The 1st respondent confirmed that he wanted payment to be part cash and part transfer and that the applicant had agreed to this. The 1st respondent raised points *in limine* to the effect that the application was improperly before the court; that the cause of action had been overtaken by events since the agreement was null and void; that the application does not disclose a cause of action and that there are material disputes of facts. Further that the application was defective for misjoinder of the Sheriff of Zimbabwe. If the court does not find favour with the first respondent's averments, it is clear that the transfer of the property should be done within a reasonable period from the date when the purchase price is paid in full. Therefore the period required for the transfer is not yet due and in any event, the 1st respondent has not received the purchase price. The applicant was improperly seeking the court's intervention to alter the terms of a private contract whose validity was being questioned. The payments made by the applicant being conveyancing and bond cancellation

fees as well as for the preparation of the agreement of sale were done without the first respondent's knowledge or agreement. The 1st respondent averred that the applicant should be slapped with an order for costs on a punitive scale.

In response, the applicant averred that clause 14 allowed an extension of the period and further that he was dealing with Rawson Properties who were the agents of the first respondent. He communicated the delays in securing finance to Rawson Properties and they duly granted the extensions. This can be gleaned from the fact that the first respondent's conveyancers communicated with applicant by way of a letter dated 23 October 2018 advising him of the conveyancing fees and also acceptance of payment for the agreement of sale fees by Rawson Properties on 24 October 2017. The applicant attached to the answering affidavit a series of whatsapp conversations between him and the first respondent's agents to rebut the first respondent's assertions.

Preliminary issues

At the hearing, I engaged *E Jera* on the propriety of attaching evidence to an answering affidavit. His response was that this was due to the fact that the 1st respondent had made certain assertions in his opposing affidavit. In *Juta and Co Ltd and Others v De Koker*,[1] the Court accepted and quoted with approval what was said in the headnote in *Shakot Investment (Pty) Ltd v Town Council of Borough of Stanger*,[2] as follows:-

> *'In consideration of the question whether to permit or strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be between a case in which the new material is first brought to light by the applicant who knew of it at the time the when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence of a further ground for relief sought by the applicant. In the latter type of case the Court would obviously more readily allow the applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom.'*

The whatsapp conversations were in the possession of the applicant at the time he deposed to his founding affidavit and I see no reason why they were not attached so as to give the first respondent an opportunity to respond. The concession by *E Jera* that they should be disregarded was well made.

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[1] 1994 (3) SA 499 (T) at 510F-H.

[2] 1976 (2) SA 701 (D).

I see no merit in the first respondent's contention that as a preliminary point, the applicant bases his cause of action on an agreement that is null and void. That is actually the essence of the dispute and cannot be a preliminary point. The applicant's claim does disclose a cause of action based on breach of contract and the first respondent's assertion that it does not holds no water. I also do not see any material disputes of fact as it is not disputed that there was an agreement of sale and that mortgage was secured and that certain payments were made. What is in dispute is the interpretation of clause 14 of the agreement of sale. The non-joinder of the Sheriff as a preliminary point is also misplaced. There is nothing that bars this court if it does find in favour of the applicant from making an order enjoining the Sheriff to sign documents as this is part of the enforcement of orders.

Merits

The basis of the dispute in my view lies in the interpretation of clause 14 of the agreement of sale which reads as follows;-

Special condition/mortgage bond

The sale is conditional upon a mortgage bond of US$35 000 (Thirty Five Thousand United States Dollars only) being approved and a bankers guarantee or financial undertaking acceptable to the conveyancers within 21 working days from the date of signature by both parties or within such reasonable extended period as the seller or his agent Rawson Properties under instructions from the seller might allow. Should the purchaser fail to secure the financial undertaking within the initial period then the period shall be extended automatically for a further 7 working days (extended period) and upon expiry of the extended period this agreement be immediately be null and void and of no force.

. Clause 14 is a condition precedent. It is common cause that the applicant and the first respondent contemplated that there would be delay in the securing of funds by the applicant and that is why the condition precedent has time frames. It is also common cause that the agreement was signed by both parties by 27 August 2017 which becomes the initial date. It its trite that in terms of the golden rule of interpretation, words should be given their ordinary grammatical meaning- see *Mudada vs. Tanganda Tea Company Ltd*, 1999(1(ZLR) 374(S) and *Chegutu Municipality vs. Manyora*, 1996(1) ZLR 262(S) @264. By specifically referring to working days, this excludes weekends and public holidays.

> "When the contract fixes a time for performance it will often be necessary to carry out a computation of time in order to ascertain when the fixed time expires. What does "seven days after Tuesday" mean? The first rule, before turning to the recognized methods of computation of time, is to seek the common intention of the parties from the wording of the contract and such evidence as may be admissible…. A fixed time "after" a particular event indicates an intention to exclude the day on which

> the event occurs, but is not necessarily decisive; "within seven days of" a particular event was intended to exclude the day or event." **See: Christie; Law of Contract in South Africa, 4th Edition at 570, National Bank of South Africa Ltd v Leon Leison Studios Ltd 1913 AD 213 at 218, Nell v Mulbarton Garden (Pty) Ltd 1971**

A calculation of 21 working days will mean that the days expired on 25 September 2017 excluding the date of signing. It is common cause that by 25 September 2017, the applicant had not yet secured the finance. The second period was "*within such reasonable extended period as the seller or his agent Rawson Properties under instructions from the seller might allow"* and the third period was, *"Should the purchaser fail to secure the financial undertaking within the initial period then the period shall be extended automatically for a further 7 working days (extended period)"*

E Jera for the applicant averred that the time period should be interpreted as follows: - 21 days plus a reasonable extended period plus 7 days. This is in keeping with clause 13:1 on breach which requires a 7 day notice period to remedy the breach. *N Mupure* for the 1st respondent averred that the time period should be calculated as 21 days plus 7 days. After 7 days without the condition precedent being fulfilled, the agreement would become null and void. He also averred that even if there was an extension, it was done without the consent of the 1st respondent. Furthermore the extension would amount to a variation and this would be in breach of clause 19 wherein the parties agreed that the agreement contained the entire contract and any variation is to be in writing and signed in keeping with the parole evidence rule.

In my view, the second period in clause 14 follows the initial 21 working days period. It is not a variation of the contract so as to require it to be reduced to writing. The onus of extending the period lay with the 1st respondent **or** (my emphasis) his agent, i.e. Rawson Properties. I do not agree with *N Mupure's* assertion that the applicant had to take action in the manner of communicating with the 1st respondent or his agent for an extension. When the applicant paid for the agreement of sale to Rawson Properties, there was no indication from them as the 1st respondent's agent that the agreement was null and void. The contract however seems to have more than one meaning when regard is had to the 3rd aspect. The question becomes one of interpretation of the contract. The approach taken in South Africa was enunciated in, *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18 when WALLIS JA said:-

> 'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

Taken in the context of a contemplation of a delay by the parties of applicant securing finance; of the admission by the first respondent that he actually wanted a 'new' contract with its own terms and conditions and the averment by the applicant that the first respondent now wanted to be paid in part cash, the sensible meaning to be put to clause 14 is that there was an initial 21 days then an extended period which the 1st applicant or his agent had to set. This approach does not amount to a re-writing of the contract for the parties. Rawson Properties as the first respondent's agent did not inform the applicant that the first respondent now considered the agreement to be null and void. In terms of clause 14, the mortgage bond and a banker's guarantee or financial undertaking is subject to acceptance by the conveyancers in this case Mupindu and Associates. Even after the expiry of the 21 working days period, they still communicated with the applicant giving him a breakdown of the transfer fees. The first respondent is therefore estopped from denying that there was an extension. And indeed by 24 October 2017, a period of one month from 25 September 2017, the mortgage finance had been secured.

In *James versus Liquidators of the Amsterdam Township Company* 1903 TS653 it was held that under the common law a seller was entitled to nominate the conveyancer even if the purchaser paid the costs of transfer. Save to the extent that parties in an agreement of sale can select otherwise, I am not aware of the variation of this common law position. In my view, Mupindu and Associates were acting as the agents of the first respondent when they communicated with the applicant by way of a letter dated 23 October 2017 indicating the

transfer fees payable. This is further indication of the extended period that the applicant referred to.

By refusing to attend to ZIMRA and to the transfer of the property, the first respondent is in clear breach of the contract. The first respondent has not denied that he was notified by the applicant of the breach. Therefore the applicant is entitled to remedies that flow from breach. *"The remedies available for a breach or in some cases, a threatened breach of contract are five in number: specific performance, interdict, declaration of rights, cancellation, damages. The first three maybe regarded as methods of enforcement and the last two as recompenses for non-performance".*[3] The innocent party, in this case the applicant has opted for specific performance as he is entitled to. I do not perceive that circumstances exist in this matter under which specific performance cannot be granted, these being impossibility of performance, undue hardship and contract for personal service. [4] Accordingly the applicant is entitled to specific performance.

I am unable however to grant the other relief sought of changing the conveyancers Mupindu and Associates to the applicant's legal practitioners. Apart from the fact that the transfer fees have been paid already, it will amount to a variation of the contract.

On the issue of costs, both parties sought costs against the other on a higher scale. There is no justification for awarding such.

Disposition

It is ordered that:-

1. The application for specific performance be and is hereby granted.
2. The 1st respondent be and is hereby ordered and directed to sign all the necessary papers and documents and attend to all the relevant offices to transfer into the applicant's name an immovable property being an undivided 3.14690411% share being share number 18 in certain piece of land situate in the district of Salisbury called stand 1282 Salisbury township measuring 892 square metres held under Deed

[3] R.H Christie- *The law of contract in South Africa*, 4th ed @page 605.

[4] See generally I. Maja- *The law of contract in Zimbabwe* @page 127

of Transfer Number 2538/2017 within twenty-one (21) days of the service of this order.

3. In the event that the 1st respondent fails to transfer the property within 21 days as specified herein, the Sheriff of the High Court be and is hereby authorised to sign all the necessary papers to effect transfer of the property specified in paragraph 2 of this order into applicant's name.

4. The 1st respondent shall pay costs of suit.

Moyo and Jera, Applicant's Legal Practitioners
Chinogwenya and Zhangazha, 1st respondent's Legal Practitioners