Judgment No S.C. 81\2001
Civil Appeal No 350\2000

DARKHILL ENTERPRISES (PRIVATE) LIMITED v E. K. SAGUTA (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU ACJ, McNALLY JA & MUCHECHETERE JA
HARARE JUNE 11 & OCTOBER 25, 2001

J.B. Wood, for the appellant

O. Ziweni, for the respondent

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 16 November 2000 in which the court dismissed the appellant's application for rescission of judgment that was granted by default on 10 February 2000.

The facts in the matter are that on 6 August 1998 the parties entered into an agreement of sale ("the agreement of sale") in which the respondent agreed to sell to the appellant a certain piece of land being Farm 13 of Lot 7A/B Middle Sabi Estate measuring 2499347 hectares ("the farm") for the sum of $6 500 000,00. The agreement contained amongst others the following conditions:-

"2. TERMS OF PAYMENT

i. 'The PURCHASER' shall apply for finance from the Agricultural Finance Corporation or any other financial institution to finance the purchase price and such application shall be made within 7 (seven) days of the signing of this agreement.

ii. In the event of 'the PURCHASER' being granted a loan that is less than the purchase price, the shortfall shall be paid direct by 'the PURCHASER' to 'the SELLER' on or before 31st December 1998.

7. Should 'the PURCHASER' fail to make any payments provided for herein or otherwise commit a breach of any of the conditions thereof and remain in default for fourteen (14) days after dispatch of written notice by registered post requiring such payment or the remedying of any other breach, 'the SELLER' shall at its sole option be entitled without further notice (in addition to, and without prejudice to any other rights available at Law):

a. To claim immediate payment of the purchase price;

b. To cancel this Agreement of Sale and retake possession of the property.

…

SPECIAL CONDITIONS

i. THIS AGREEMENT OF SALE IS SUBJECT TO THE APPROVAL OF THE AGRICULTURAL FINANCE CORPORATION

ii. This Agreement of sale is further subject to the condition that 'the PURCHASER' is granted a loan in principle by the Agricultural Finance Corporation within 150 (one hundred and fifty) days of the date of the signing of this agreement.

iii. RENT

It is recorded and agreed that 'the PURCHASER' has planted wheat on the entire hectarage of the farm. In the event of this agreement being cancelled 'the PURCHASER' shall pay rent to 'the SELLER' in the sum of $350 000,00 and notwithstanding any provisions to the contrary contained in this agreement shall vacate the farm on 31st May 1999 …"

The respondent, in an affidavit sworn to by one Elliot Kwaodini Saguta Makuyana ("Makuyana"), the respondent's Managing Director, alleged that the appellant was in breach of the material terms of the agreement of sale in that it failed to procure a loan from the Agricultural Finance Corporation ("the AFC") or any other financial institution within the time frame stipulated in the agreement of sale and further, that the appellant failed to pay the purchase price within 150 days of the date of the signing of the agreement of sale as stipulated in the conditions stated above. In the circumstances the respondent, through its legal practitioners on 31 May 1999, sent a letter by registered post requiring the remedying of the alleged defaults within 14 days and informing the appellant that it is entitled at its sole option, without further notice, to either claiming the immediate payment of the full purchase price or to cancel the agreement if by then the appellant had not complied.

The respondent further alleged that in spite of the said notice the appellant has failed to remedy the breaches and that no explanation of the failure has so far been forthcoming. In the result the respondent caused a letter dated 8 July 1999 confirming the cancellation of the agreement of sale and indicating they were instituting proceedings for ejectment and payment of damages suffered. The appellant has, however, refused to vacate the farm and has also failed to pay any rentals to the respondent ever since it assumed occupation of the farm. In the circumstances the respondent, on 13 July 1999, made an application in the court *a quo* for the agreement of sale to be cancelled and that the appellant be ordered to pay the sum of $350 000,00 as at the 31st May 1999 and damages for holding over at the rate of $1 167,00 per day from 1 June 1999 to the date of ejectment.

On 27 July 1999 the appellant filed a notice opposing the respondent's application. In the opposing affidavit one Lovemore Chigumira ("Chigumira") the appellant's Managing Director, denied that the appellant was in breach of the conditions of the agreement of sale in the manner set out in the respondent's founding affidavit. In connection with the application to the AFC Chigumira stated that at the time the agreement of sale was signed the respondent was informed that an application had already been made to the AFC. Chigumira attached to his affidavit a letter by the AFC to the Corporate Secretary and Legal Advisor of Commercial Bank of Zimbabwe Limited, Agri-Business Department, dated 5 August 1998 as confirmation of the application. This reads:-

> "Re: DARKHILL ENTERPRISES (PVT) LTD (B. SUMBA)
>
> This letter serves to confirm that the Corporation is currently considering a farm purchase loan application from the above-named client. The farming loan is payable over a period of ten years and the first instalment due on 31 December 1999."

As for the special condition clause ii Chigumira submitted the following:-

> "This means the purchaser does not necessarily have to have the loan money physically but as long as he has procured the loan in principle with the AFC. The Respondent (appellant) avers that it procured the loan in principle from AFC within the time prescribed. The second sentence in Annexure A hereto (letter of the 5th August 1998 quoted above) bears Respondent out on this point appositely."

Chigumira also denied that the appellant failed to respond to the respondent's purported notice on the matter. In this connection he produced copies of two letters dated 11 June and 19 July 1999 by the appellant's legal practitioners to the respondent's legal practitioners. In those letters it was pointed out that the

appellant denied that it was in breach of any of the conditions of the agreement of sale. It was also pointed out that a loan from the AFC had been secured in principle and that the appellant had, in fact, paid some monies to the respondent's creditors which would be set off against the purchase price. The appellant also alleged that it had also advanced monies amounting to $2,8 million to the respondent. The appellant therefore rejected the purported termination of the agreement and demanded specific performance.

Chigumira went on to explain that there was no date of payment of the purchase price. He went on to state that the appellant had to pay on behalf of the respondent amounts owed to various creditors who had gone to the extent of attaching property on the farm totalling $653 208,10. The appellant alleged that it made various payments and takeover of these debts before 31 December 1998. In connection with the $2,8 million said to have been advanced to the respondent, Chigumira stated that the respondent signed an acknowledgment of debt in respect of the same and that this was also secured by a Deed of Suretyship. Chigumira further stated that before 31 December 1998 the appellant entered into an agreement with AFC in the presence of the respondent's representatives, in terms of which it (appellant) took over the respondent's debt to the AFC amounting $4 651 630,11 and that the amount was to be paid on 31 December 1999. Chigumira went on to state that in the circumstances the respondent was relieved of the obligation to pay that amount. He went on to state that the appellant also took over the respondent's debt with UDC which amounted to $1,2 million and that the appellant is in the process of liquidating that debt. And further that the appellant also agreed to take over the respondent's debt with the Regional Water Authority amounting to $205 064,13.

Chigumira also submitted that as the above agreements to take over the respondent's various debts was reached before the respondent purported to cancel the agreement of sale the appellant had already paid the purchase price in full at the time of the purported cancellation in that the total amount agreed to be taken over by the appellant was more than the purchase price.

In the Answering Affidavit Makuyana stated that the AFC's above quoted letter does not indicate that a loan had been granted in principle within the time stipulated. He maintains that all it does is acknowledge that an application for a loan had been made. He went on to state that this view was fortified by the fact that the AFC, on 31 May 1999, wrote to the respondent, seeking to foreclose its mortgage. He argued that that would not have happened if the appellant had been granted a loan in principle. Makuyana therefore argues that the truth of the matter is that although the appellant had applied for a loan no such loan had been secured or granted in principle "within 150 days of the signing of this (the said) agreement". The 150 days in question expired on 3 January 1999. In the circumstances the condition precedent was not fulfilled and the respondent was entitled to cancel the agreement and demand that the appellant be ejected from the farm after it failed to rectify the breach.

Makuyana concedes that the agreement of sale does not indicate the date for payment of the purchase price but stated that the aspect of cancellation is adequately covered by the provision that the appellant had to be granted a loan in principle within 150 days of the signing of the agreement of sale and that the

consequences of such failures would result in the cancellation of the agreement of sale, the demand for rent and eviction of the appellant from the farm.

Makuyana also explained that the acknowledgment of debt stood on its own and that it is in no way related to the manner in which the purchase price of the farm was to be paid. In this connection, he points to clause 14 of the agreement of sale which indicates that the agreement of sale constitutes the entire agreement between the parties and that there was no mention of the acknowledgment of debt in the agreement of sale. The acknowledgement of debt was therefore complete in itself with its own terms, conditions and penalties. In connection with the loan of $2 800 000,00 (two million eight hundred thousand dollars) he stated that there was also no mention whatsoever of it as having anything to do with the purchase of the farm in the agreement of sale and that it was dependant on the creditor (appellant) paying or taking over the debts mentioned in the acknowledgement of debt and further advancing the respondent an amount of $240 000,00. He indicated that the respondent was indeed obliged to refund the appellant all the monies it had paid or debt taken over on or before 31 December 1999 on behalf of the respondent but not in respect of debts not taken over and the $240 000,00 which was not advanced.

Makuyana denies that the appellant paid the sum of $4 651 603,01 to the AFC and also denies that he ever took over that debt. He argued that if that had been done the AFC would not have foreclosed on the respondent on 31 May 1999 and demanded immediate payment from it. And, indeed, presently the AFC is looking to the respondent and not the appellant for what is due. He also states that after the respondent cancelled the agreement of sale it notified the AFC of the same and put

proposals on how to settle the money due to it (AFC). He also states that the appellant only actively pursued the matter of loan from the AFC after it received a letter cancelling the agreement of sale and as already indicated above this was after the 150 days had expired. In this connection he produced in support a letter dated 22 July 1999 from the AFC to the appellant and copied to the respondent's legal practitioners stating that as the seller (respondent) had indicated that it was no longer interested in the deal the AFC will therefore defer your application until the situation was clarified.

In my view the main issue to resolve in this matter is whether or not the appellant fulfilled the provisions of special condition ii of the agreement of sale. I agree with the submission by Mr *Ziweni,* for the respondent, that that condition was not fulfilled. In my view a reading of the letter by the AFC dated 5 August 1998 does not give the impression that the AFC was granting a loan in principle to the appellant. It is only a confirmation that an application for the loan had been made by the appellant to the AFC and that it was being considered. This only fulfills the first part of the said clause which required an application to be made within 7 days of the signing of the agreement of sale. The second part which requires that a loan be granted in principle within 150 days is not fulfilled by the contents of that letter. Further it was not written to the appellant as an offer but as information to its bankers. This, in my view, is fortified by the evidence in Makuyana's affidavit that if a loan had been approved to the appellant in principle the AFC would not have foreclosed the mortgage against the respondent. The AFC would have been satisfied to receive payment from the appellant instead but it had all along sought payment from the respondent. I also agree that whilst the date of payment of the purchase price was not

indicated in the agreement the fact remains that the sale was made conditional upon the fulfillment of the said special clause ii. The seller (respondent) was therefore entitled to activate the provisions of that clause to effect cancellation of the agreement of sale. My view is further fortified by the fact that in the said letter dated 22 July 1999 the AFC wrote to the appellant indicating that its application was being deferred. If a loan had by then been granted in principle the letter would have indicated that the offer of the loan which had been granted in principle was being withdrawn.

From the above it follows that it cannot be correct that the appellant had in fact taken over the respondent's debt with the AFC amounting to $4 651 603,01. This is because if that had been the case the AFC would not have foreclosed on the respondent and demanded from it monies due. The above amount included the mortgage monies which would have fallen to be repaid by the appellant if his loan had been approved by AFC. Further, I agree with the arguments in Mr Makuyana's affidavit and the submissions by Mr *Ziweni* that the question of the acknowledgement of debt and the taking over of the respondent's debt should be treated separately from the issue of the agreement of sale. In this connection I agree that the agreement of sale must stand on its own as is specifically stated in the contents of the agreement of sale itself. The other matters, arrangements or agreements do not refer to the agreement of sale and as Makuyana stated, they are complete in themselves with their own terms, conditions and penalties. Indeed it has been conceded that the respondent will have to repay all monies advanced in terms of those arrangements.

From the above it is clear that I am of the view that the appellant was in breach of the special condition clause ii of the agreement of sale. I am also of the

view that the respondent properly terminated the agreement of sale. Its defence to the application has, therefore, no merit. In view of these findings I do not propose to go into the point *in limine* on whether the learned judge in the court *a quo* was correct in deciding that the application was out of time. A decision either way would not affect the end result.

In the result the appeal is dismissed with costs.

CHIDYAUSIKU ACJ: I agree

McNALLY JA: I agree

Byron Venturas & Partners, appellant's legal practitioners

Ziweni & Company, respondent's legal practitioners