

REPORTABLE (5)

Judgment No SC 5/06
Civil Appeal No 362/99

THANDO MOYO v (1) MALCOLM FRASER (2) MESSRS COGHLAN
AND WELSH

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & GWAUNZA JA
BULAWAYO NOVEMBER 29, 2004 & March 9, 2006

The appellant in person

P. Dube, for the first respondent

N. Mathonsi, for the second respondent

CHIDYAUSIKU CJ: There is only one legal point involved in this appeal. It is whether the purchaser of land on instalments who has not registered the agreement of sale in terms of s 64 of the Deeds Registries Act [Chapter 20:05] can interdict the trustee of an insolvent estate from selling such land to a third party.

The facts of this matter are set out in some detail by the court *a quo* in Judgment Number HC-1065-99. Repeating them in this judgment will not serve any useful purpose. I will only set out the salient facts which are as follows.

Mr J.M. Ngwenya (“Ngwenya”) was the registered owner of a certain property I shall refer to hereinafter as “Lot 4”. Lot 4 was a sub-division of a larger portion of land owned by Ngwenya. The purchase price was \$25 000 payable in instalments. The purchase price was paid in full to Ngwenya. The purchase price was paid by way of instalments.

It is not disputed that this was a sale of land on instalments. Ngwenya’s estate was placed under sequestration by an order of the High Court sitting in Bulawayo and Malcolm Fraser, the first respondent was appointed the liquidator and trustee. I shall refer to him as “the trustee”. The trustee then sold property belonging to the insolvent estate of Ngwenya including Lot 4 to various purchasers.

It is contended by the appellant and not disputed by the respondents that Lot 4 was only one of a number of sub-divisions sold by Ngwenya to various individuals before he became insolvent. The trustee, for reasons which are not clear from the record, sold the sub-divisions to the same purchasers but denied the appellant the same opportunity to buy Lot 4. The trustee instead sold Lot 4 to a third party. It is apparent, however, from the record that the appellant at one time received \$7 000 without prejudice as his *pro rata* claim against the insolvent’s estate in respect of monies he had paid as the purchase price of Lot 4. It is also apparent from the record that the appellant offered to pay for Lot 4 in an amount in excess of the purchase price agreed to by the third party. This offer was turned down. From a legal point of view the trustee could not accept this

offer if he had already sold Lot 4 to a third party. The appellant was aggrieved by this turn of events. The trustee instructed the second respondent to effect transfer of Lot 4 to the third party.

The appellant objected to the sale and transference of Lot 4 to the third party. He applied for and was granted a *rule nisi* calling upon the trustee to show cause why a final order should not be made interdicting transfer of Lot 4 to a third party and directing that it be transferred to him. The interim relief was granted to the appellant pending the confirmation or discharge of the *rule nisi*. The application was opposed and on the return date the *rule nisi* was discharged. The appellant now appeals against the judgment discharging the *rule nisi*.

In discharging the *rule nisi* the learned judge had this to say:

“The point involved in the application is a short one. It is, whether the applicant has a right to the transfer of Lot 4 into his name. He entered into a contract of sale with a person who became insolvent before performing the personal obligation of transferring the immovable property to him.

At the time the insolvent’s estate was sequestrated, the applicant had no real rights in the land. The *dominium* of the land lay with the insolvent. The applicant only had a personal right to claim transfer of the land from the insolvent.”

Later on in his judgment the learned judge reasoned as follows:

“The trustee was vested with the ownership of the immovable property registered in the insolvent’s name by virtue of the sequestration order. He took over the *dominium* of the land for the benefit of all creditors of the insolvent estate. Unlike the insolvent whose duties towards the applicant were governed by the

terms of the contract of sale entered into personally the right and duties of the trustee were governed by the Insolvency Act [Chapter 6:04]. His obligations were not of a personal nature as were those assumed by the insolvent under the contract of sale. He took over the ownership of the immovable property registered in the name of the insolvent in an official capacity and had to deal with it in the best interests of all creditors.

The position of a purchaser of land who paid the purchase price but had not received transfer of the property at the date of sequestration of the seller's estate is that he has no right at common law to the transfer of the land. The purchaser is not entitled to prevent the trustee in an insolvent estate from transferring the property to a third party if that is in the best interests of creditors. *Ex parte Singleton* 1963 R & N 1.

In *Harris v Trustee of Buissinne* (1850) 2 Menzie 105 the plaintiff entered into a contract of sale with *Buissinne* in terms of which he bought the latter's house for £1 050,400 of which it was stipulated should be paid immediately in cash, and for the balance of £650 the plaintiff agreed to pass a mortgage bond in favour of the directors of a Savings Bank. On the same date the plaintiff paid *Buissinne* the £400 he took possession of the house. *Buissinne* was unable to give the plaintiff transfer of the house so that he might perform his obligation to execute a mortgage in favour of the Savings Bank. The plaintiff took out summons against *Buissinne* who surrendered his estate as insolvent and it was placed under sequestration. In an action in which the plaintiff prayed for an order condemning *Buissinne* to give him a legal transfer, the trustee of the insolvent estate pleaded that he was not liable to give transfer to plaintiff.

Giving judgment for the trustee of the insolvent estate the court said at pp 107-108:

'By the law of Holland, the *dominium* or *jus in re* of immovable property can only be conveyed by transfer made *coram lege loci* and this species of transfer is as essential to divest the seller of and invest the buyer with the *dominium* or *jus in re* of immovable property as actual tradition is to convey the *dominium* of movables and that the delivery of the actual possession of immovable property has no force or legal effect whatever in transferring its *dominium*.

Consequently, the agreement of sale between Harris and *Buissinne* and the delivery of the possession of the house by *Buissinne* to Harris, gave Harris nothing more than a *jus ad rem* and a personal claim against *Buissinne* to convey the *jus in re* to him by transfer *coram lege loci*. And, therefore, on the day on which *Buissinne's* estate was placed under sequestration the *dominium* of the house in question was still vested in *Buissinne* and then formed part of his estate and that by the order placing his estate under sequestration this house became instantly and wholly vested in the Master

and ultimately in the trustee for behoof (benefit) of the creditors of *Buissinne*.

On these grounds it followed that Harris had only a personal claim against *Buissinne's* estate for the damage which he has sustained by the non-fulfillment of his undertaking to perfect the sale by making legal transfer of the house to Harris and for restitution of that part of the price which he has paid, and in respect of this personal claim, he has no preference on the house in question, or on any other part of the estate, and is only entitled to be ranked concurrently with the other personal creditors of *Buissinne*.'

As pointed out above, there was no endorsement on the title deed that the piece of land sold to the applicant by the insolvent was subject to a contract of sale by instalments. Had such an endorsement been made in terms of section 64 of the Deeds Registries Act [Chapter 20:05] and all the other requirements prescribed thereunder met, the applicant would have had a statutory right to take transfer of the land subject to the payment of the outstanding balance under the prior real right secured by the registered mortgage bond.

Without the protection provided by an endorsement on the title deed in terms of section 64 of the Act, the applicant had no right to demand transfer of the land into his name once the trustee decided that the transfer of the immovable property to him was not in the best interests of all the creditors of the insolvent estate and elected to sell the property to a third party. The court has no power in the circumstances to impose on the trustee a duty which the law says he does not owe the applicant.

In proving his claim for \$25 000 against the insolvent estate and receiving a dividend of \$7 500 on that claim, the applicant pursued the remedy consonant with his position as a concurrent creditor of the insolvent estate. He had no legal basis however upon which to demand transfer of Lot 4 of subdivision L of Stand 178 from the trustee. He also had no right to prevent the trustee from transferring the property to a third party.

The provisional order granted on 12 March 1999 is therefore discharged with costs."

I entirely agree with the reasoning and the conclusion of the learned judge in the court *a quo*. The appellant has no leg to stand on. In the Notice of Appeal and Heads of Argument the appellant sought to rely on the provisions of the Contractual Penalties Act [Chapter 8:04]. A perusal of that Act clearly shows that it has no relevance

to the issue that was before the court. That Act deals with contractual rights terminated by way of breach of contract and not by insolvency as in *casu*. The appellant also sought to rely on the South African Sale of Land on Instalments Act 72/71. That Act only applies to agreements of sale in South Africa and has no application in Zimbabwe. The numerous South African cases cited by the appellant deal with the interpretation of the South African Act. The cases are totally irrelevant and no useful purpose will be served by discussing them in this judgment. In Zimbabwe the rights of the parties in a contract of sale of land by instalments is regulated by the Deeds Registries Act [Chapter 20:05] (“the Act”). Section 64 of the Act provides as follows:

“64 Sale of land on instalments

- (1) Where land is sold in terms of a written contract whereby the purchase price is payable in three or more instalments, the registrar shall, upon the lodging with him in terms of this section of the written consent of the registered owner and the purchaser, endorse on the title deed of the land concerned that such land is subject to the contract.
- (2) The endorsement in terms of subsection (1) against the title deed of any land shall confer on the purchaser of the land concerned subject to this section and to any prior real rights attaching to the land, the following rights –
 - (a) in the event of the insolvency, assignment or liquidation of the seller’s estate or the vesting of the seller’s estate in a trustee or assignee in terms of the law relating to insolvency or a proposed sale in execution of the land, and upon him notifying his election thereof within three months of the insolvency assignment, liquidation or attachment of the land, as the case may be, to the trustee, assignee, liquidator or officer charged with the sale of the land, either –
 - (i) a charge over the land in favour of the purchaser for the amount of any instalments and deposit paid by him to the seller and for the value of any improvements effected upon the land by the purchaser and valued in terms of subsection

(4) less the amount, if any, referred to in paragraph (d) of subsection (5); or

- (ii) a right to take transfer of the land subject to the payment of the outstanding balance of the purchase price under the contract or, if the land is encumbered under a prior real right securing a monetary obligation, to the payment of the outstanding balance under the prior real right whichever is the greater:

Provided that where the land sold under the contract is a portion of land the whole of which is subject to such a prior real right, the purchaser shall be entitled to take transfer of the land upon payment of the sum referred to in subsection (3) or the balance of the purchase price under the contract, whichever is the greater;

- (b) where the provisions of paragraph (a) do not apply or he has not made an election in terms of that paragraph, the right enforceable against all person whatsoever to abide by the contract and to take transfer of the land upon fulfilment of the conditions of the contract.

...”

The above section stipulates that the rights conferred by s 64 only accrue upon the registration of the agreement of sale with the Registrar of Deeds. Failure to register the agreement is fatal to the accrual of the rights. The agreement of sale between the appellant and Ngwenya suggests the parties were aware of the need to register the agreement. Clause 6 of the agreement provides for the payment of costs of such registration. The reference to s 62 of the Act in clause 6 appears to be erroneous as it appears that the intention was to refer to s 64 of the Act. The agreement of sale between the appellant and Ngwenya was never registered in terms of s 64 of the Act. This is fatal to the appellant’s case and is the source of the appellant’s problems.

While the appellant's sense of grievance is understandable, namely, that purchasers of the other sub-divisions of the same stand from Ngwenya in similar circumstances were allowed by the trustee to conclude their agreements, while he was not, the fact of the matter is that the appellant was the author of his own misfortune. He should have registered his agreement of sale with Ngwenya in terms of s 64 of the Act.

Finally I wish to comment on the voluminous documents filed by the appellant. This is not permissible and should be punished by an appropriate order as to costs. The Court, however, notes that the appellant is a self actor and is prepared to allow him some latitude. Also, the appellant's remarks about the presiding judge are simply unacceptable and border on contempt of court which calls for an appropriate sanction. However, the Court again decided to err on the side of leniency because of the apparent injustice that the appellant received at the hands of the trustee. Let the appellant be warned that in future he will not get away with impunity for such deplorable conduct.

In the result the appeal is dismissed with costs.

ZIYAMBI JA: I agree.

GWAUNZA JA: I agree.

Coghlan & Welsh, first and second respondents' legal practitioners