

GRISON MUWIDZI
versus
OPTIMACK INVESTMENTS (Pvt) LTD
and
REGISTRAR OF DEEDS.

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 27 November 2008 and 25 February 2009

Opposed Application

Advocate *Fitches*, for the applicant.
Mr P Nyeperayi, for the 1st respondent.

UCHENA J: The applicant and the first respondent entered into an agreement of sale. In terms of that agreement the applicant, was to purchase stand 58 Greystone Township 2 of Lot A of Borrowdale Estate measuring 4730 square meters. The agreement was entered into on 18 February 2008. In terms of clause 2 which deals with the terms of payment, “\$1 950 000 000 000 (One trillion nine hundred and fifty billion Zimbabwe dollars was to be paid “within three (3) days of signing this agreement of sale to Kingdom Asset Management.”

The applicant completed an RTGS form on 21 February 2008 and presented it to his bank, instructing it to pay the first respondent’s agent the purchase price. The RTGS form which was attached as annexure B to the applicant’s application has the following material details.

It was addressed to CFX Bank requesting it to transfer \$1 950 000 000 000 to Kingdom Securities Ltd Call Account. It is dated 21 February 2008. The value date is indicated as 22 February 2008. The account to be debited is indicated as c/o CFX. It is endorsed at the bottom in long hand “Debit new account No 172 1197287-011” and “pd. 22/2”.

The following facts are common cause;-

1. The first respondent sold the property to a third party on 21 February 2008.
2. The applicant was offered another unspecified stand on a without prejudice basis

3. The applicant applied for a provisional order interdicting the first respondent from selling, disposing, transferring or alienating the immovable property to any person other than the applicant.
4. The provisional order was granted by HLATSHWAYO J on 5 March 2008

The applicant now seeks confirmation of the provisional order. The first respondent seeks its discharge. The issue to be decided is whether or not the applicant paid the purchase price within the agreed period.

Advocate *Fitches* for the applicant submitted that the provisional order should be confirmed as the applicant has a clear right emanating from his having complied with the terms of the agreement of sale by paying the purchase price within the stipulated period. Mr *Nyeperai* for the first respondent submitted that the provisional order should be discharged as the applicant has not established a clear right as the agreement lapsed, when the applicant failed to pay the purchase price by the 21/02/08.

The issue on which this case hinges is whether or not the applicant paid the purchase price within the stipulated period. Put differently the issue is whether the instruction given by the applicant to CFX Bank on 21 February 2008, constitutes payment within 3 days as provided in clause 2, or payment by the 21 February 2008 as provided in clause 17 of the agreement of sale.

Clause 17 provides as follows;-

“It is a condition precedent of this agreement that the Purchaser signs and pays the full purchase price stipulated in paragraph 2.1 (sic) on or before 21 February 2008 failing which the agreement shall immediately lapse and be of no further force or effect.”

Clause 2 of the agreement provides as follows;-

“Z \$ 1 950 000 000 000 (one trillion nine hundred and fifty billion Zimbabwe dollars) to be paid within three (3) working days of signing this agreement of sale to Kingdom Asset Management”

It is clear from clauses 2 and 17 that payment was to be made before the closing of business on 21 February 2008. Failure to comply would lead to the lapsing of the agreement of sale.

Advocate *Fitches* submitted that the ZETTSS PAYMENT FORM annexure B proves that the applicant paid within 3 days as required by clause 2, and on or before 21 February 2008 as stipulated by clause 17. He relied on rule 1.1 of the Zimbabwe Electronic Transfer

And Settlement System Operating rules, (R.B.Z.ZETSS-1 (Issue 5) which provides as follows;-

- 1.1 “The Zimbabwe Electronic Transfer and Settlement System (ZETSS) allows for the real time, irrevocable interbank transfer of funds on a same-day value basis using settlement accounts held at the Reserve Bank of Zimbabwe.”

Mr *Nyeperayi* for the respondent on the other hand submitted that payment is made when the sending bank’s account is debited and the receiving bank’s account is credited with the amount specified in the payment instruction. He relied on rule 9 of the ZETSS operating rules, which provides as follows-;

9. “A payment instruction under ZETSS is deemed to be final and irrevocable once the sending bank’s account is debited and the receiving bank’s account is credited with the amount specified in the payment instruction”.

It seems to me that the submissions made by Counsel for the applicant are correct. Rule 1.1 deals with the general intention behind the introduction of this type of transfer of funds. It was intended to be a quick way of transferring funds, so that the funds so transferred could reflect in the recipient’s bank account on the same day. It makes it clear that once the instruction is given it becomes irrevocable, meaning that payment must be deemed to have been made at the time the instruction was given. Rule 9 on the other hand provides for the stage when such a payment becomes final and irrevocable. In my view this merely provides for the finality of an already irrevocable payment. I would therefore not agree with Mr *Nyeperayi* that payment is made at the time the receiving account is credited.

Rules 1.1 and 9 must be interpreted within the context of other provisions of the operating rules. Rules 7.1 and 7.4 (a), of the rules, shade light to their true meaning.

They provide as follows-;

- 7.1 “Only unconditional, irrevocable payment instructions between participants and between participants and the Reserve Bank may be made through the System.”
and
- 7.4 “Participants may capture payments that are to be effected at a future date or time, on condition that:-
 - a) Such payments shall be scheduled for a business day and time the System is in operation.”

This to me means as a general rule only unconditional irrevocable payment instructions between participants and the Reserve Bank can be made. This would mean payment would be deemed to have been made on the day the paying party gave instructions to his Bank. In this case it would mean payment was made on 21 March 2008. If there was no exceptions to rules 1.1 and 7.1 I would have had no difficulties in finding that the applicant paid within the agreed period. However the paying participant can in terms of rule 7.4 (a) instruct his bank to capture a payment that is to be made in the future. If he does, payment cannot be deemed to have been made on the date of the instruction, but on the stipulated future date.

In this case it is common cause that the applicant in giving instructions to his bank in annexure B indicated the value date as 22 February 2008. That is the date on which he intended to effect payment. That is the date on which his bank effected payment as he had instructed it to. The date of payment is in this case not the day the instruction was given but the future date stipulated by the applicant in his instructions. In the result the applicant paid on 22 February 2008, when the agreement required him to pay by the 21 February 2008. This means the agreement lapsed at the close of business on 21 February 2008.

There is therefore no legal basis on which the provisional; order granted on 5 March 2008 can be confirmed. The right on which it depended was extinguished by the lapsing of the agreement of sale. It is therefore discharged with costs.

Mapombere Musakana & Ruzengwe, applicant's legal practitioners.

Costa & Madzonga 1st respondent's legal practitioners.