

TRACY MUNJAYI
versus
PARTMORE CHANETSA MUPFEKERI
and
MASTER OF THE HIGH COURT
and
REGISTRAR OF DEEDS
and
DEPUTY SHERIFF HARARE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 June & 4 September 2014

Trial Cause

S. Chatsanga, for the plaintiff
F. Malinga, for the 1st defendant

TSANGA J: This trial action essentially seeks resolution of transfer of certain immovable property described as stand 1859 Dzivarasekwa, Harare, purportedly purchased under an agreement of sale which has not been honoured by way of transfer of the property for an array of contested reasons which inform the dispute. This matter also consolidates Case No. HC 12600/11 dealing with the same dispute.

The plaintiff is Tracy Munjayi who purportedly bought the property in June 1999 through the assistance of her late husband. The seller is one Emily Chanetsa who died in 2005 before transfer could be effected. The first defendant is the son of the late Emily Chanetsa who died in 2005. He is cited in his capacity as executor dative in the estate of the late Emily Chanetsa, his mother. The second to fourth defendants are cited in their various official capacities. There was no appearance on their behalf.

It is not in dispute that the late Emily Chanetsa was the owner of a certain immovable property House No 1859 Tynwald South Harare. In 1999 the said Emily Chanetsa entered into an agreement of sale, duly signed by both parties on 17 June 1999 for the sum of ZW\$150 000-00. The sale was handled by an estate agent known as Deltec Properties and it was the plaintiff's stance that the estate agent represented the sellers. She and her husband had according to her evidence responded to an advert of the property placed by the estate

agent. A copy of the cheque paid to the estate agent was produced as exh 2 during the trial as well as the receipt for payment made given by the estate agent which was exh 1. The plaintiff's view was that the receipt would have been given when the cheque had cleared. This estate agency is no longer in existence and its owner is also deceased. What is clearly not disputed is that an agreement of sale was signed by the parties through the estate agent with regard to the property.

It was also the plaintiff's averment that vacant possession was granted three months after payment and the agreement of sale had been entered into. She further asserted that after taking vacant possession albeit pending the transfer of the property into her name, it emerged through correspondence that was being sent by C.A.B.S to the property, address that certain monies were owed to it by the seller under a mortgage bond. It was her evidence that the money owing was then paid off by her husband and herself. This constituted an initial amount of Z\$15 000-00 on 3 February 2000 and another additional amount of Z\$15000-00 paid on 3 April 2000. The computer printout of these payments to C.A.B.S was produced as exh 11. The payment of the bond and production of the receipts as proof thereof are challenged by the defendant – an issue which will be addressed more fully in this judgment. According to the plaintiff, the payments were to enable the upliftment of the mortgage bond registered against the property in order to effect transfer of ownership. Two letters written by the conveyancing attorneys to the late Emily Chanetsa to complete the transfer process yielded no results. Following her death efforts to also get the defendant as executor to transfer the property came to nought. Instead, it was the plaintiff's evidence that the defendant unlawfully evicted her tenant when she was out of the country in November 2012 without any court order or the plaintiff's permission. In essence the plaintiff was in possession of the property from late 1999 until November 2012 when her tenant was evicted. The plaintiff's position was that she validly bought the property and that transfer of the property is due to her.

The first defendant's version was different from that put forward by the plaintiff. According to him he assisted the late Emily Chanetsa who was his mother with the sale of the property. He disputed that the agents were for the sellers. His assertion was that the plaintiff attempted to purchase the property but that the sale was cancelled due to non-payment of the purchase price. He described the circumstances leading to its cancellation as follows. Once the contract of sale had been entered into the parties went to Dzivarasekwa District Office with the intention of effecting cession. It was his contention that the cession could however,

not be effected since the District Officer refused to do so on the basis that the seller had not received the purchase price. It was his further contention that the Agreement of Sale was then torn up by the officer in question and the late Emily Chanetsa effectively cancelled the sale. He put this event as having taken place a day after the signing of the agreement. He further averred that the plaintiff proceeded thereafter to occupy the house on the basis that they had lost money through the agents. He stated that at one time the plaintiff's late husband indicated that he would stay in the house for at least 10 years as compensation.

The essence of the first defendant's refusal to have the property transferred is that his agreement of sale was cancelled for non-payment of the purchase price.

The issues for determination in the trial as captured in the joint PTC minute were as follows:

1. Whether or not the plaintiff and the deceased concluded a lawfully binding and enforceable Agreement of Sale of stand 1859 Tynwald Township Harare.
2. Whether the first defendant has the obligation to pass transfer of ownership of the property in question.
3. Whether the first defendant and all those persons obtaining title through him must vacate from the property in question.
4. Whether or not the purchase price was duly paid.

As stated above, that the Agreement of Sale was signed is not in dispute. What is in dispute is whether it was cancelled. Since the sale was said to have been purportedly cancelled by the seller due to non-payment of the purchase price linked to this is therefore the issue of the agent who received the purchase price and whom they represented.

In the case of *Voteti Trading (Pvt) Ltd v Kathleen Hancock & Registrar of Deeds* HH 330 2012 PATEL J as he then was, addressed the issue of whom an agent in a sale represents. Among the issues for decision in that case was whether the estate agent in the matter represented the plaintiff as purchaser or the defendant. If he was the defendant's agent a concomitant issue was whether he had authority to receive payment on behalf of the defendant as the seller. In framing the resolution of that particular dispute, he opined as follows:

“In the absence of specific instructions, an estate agent stands in the unique position of being a broker between the parties rather than as agent of either. See *Christie Business law in Zimbabwe 2nd Edition 1998* pp. 332- 336. Thus any specific agency vested in an estate agent must be clearly established from

the conduct of the parties, the relevant documentary evidence and the circumstances of the case.”

Since it is not in dispute that the parties entered into an agreement through Deltec properties, it is to the agreement of sale that reference must therefore be made as to what was expected of each under that agreement. The agreement was produced in court as exh 3. With regards to payment of the purchase price the agreement was couched as follows in clause B:-

“The purchase price shall be the sum of \$150 000.00 (one hundred and fifty thousand Dollars) payable cash upon signing of this agreement.”

Under special conditions clauses 2 and 3 which are of relevance to the dispute as regards payment of the purchase sum read as follows:

- “2. The transfer of this property from the seller to the purchaser shall be carried out by the conveyancers to be nominated by the seller.
3. Transfer of the property shall not be registered unless and until the Agent’s commission on this sale shall have been paid or secured to the satisfaction of Deltec properties Pvt Ltd and the seller hereby authorises the said agent or conveyancer to deduct the commission from the moneys (sic) when the same becomes due to him, such commission amounts to \$7 500 (Seven Thousand Five hundred dollars)”

The amount was at that time in Z\$ as opposed to the US\$ currency which is currently in operation. Looking at clause 3 above the phrase “the seller hereby authorises the said agent or conveyancer to deduct the commission from the moneys (sic) when the same becomes due” to my mind makes it clear that whatever monies were to be paid were to be transited through the agent otherwise how else would he effect his deduction. The cheque in question was made out to the estate agent on 15 June 1999. The defendant queries this as not being in keeping with the mode of payment stipulated in the agreement which was to be cash upon signing. The seller signed the agreement on 17 June 1999 whilst the buyer signed on 18 June 1999. It was the defendant’s argument that the cheque would have needed at least two weeks to clear and therefore did not constitute cash. However, even if this argument were to be accepted, the cancellation clause upon signing of the agreement stipulated that the seller was to give the purchaser two weeks notification of cancellation for any breach. Even

allowing for the clearance of the cheque, the payment would well have been within the time frame envisaged in the agreement for rectifying any breach. But more importantly there was nothing anomalous in the payment of the purchase price through a cheque as opposed to cash. As stated in *Vliet v Adler, Kessly and Salomon* 1979 (3) SA 156 (W) at p159.

“In the case of sale of immovable property where transfer can only be effected in a Deeds Registry, the well-established practice is to effect payment of the purchase price through a banker’s or a building society guarantee, which is furnished to the seller before transfer but which becomes payable on registration of transfer.”

Ordinarily the money paid would remain that of the purchaser until transfer had been effected. Thus in *casu*, transfer would normally have been done immediately upon such payment so as not to delay the handover of the money. It is clear that transfer appears to have hit a snag because of the mortgage bond which was attached to the property. It would also appear that by granting vacant possession to the plaintiff, the parties seem to have entered into an arrangement pending transfer which would seem to have been predicated on receipt of the purchase price. It makes absolutely no sense for the seller to have surrendered the property without receiving a single cent of the purchase price.

Clause 11 of the agreement dealt with cancellation and was couched as follows:

“11. CANCELLATION – Should the purchaser fail to pay any sum of money due in terms of this agreement on the due date conditions of this agreement, then the seller shall have the right to call upon the purchaser in writing to rectify such default within a period of (14) fourteen days and upon the purchaser’s failure to rectify such default, then the seller shall have the right without prejudice to any claim which might then have accrued against the purchaser. In the event of the seller also failing to honour the agreement of sale, the purchaser has the same rights to make such claim. Should anyone of the parties wish to cancel, 14 days’ notice should be given before any such cancellation takes place.”

In light of this clause I find that the agreement was never cancelled since there was never any action on the seller’s part to call in the cancellation of the agreement in accordance with the terms stipulated in the agreement. The defendant’s version that the agreement was torn up by the officer at the City Council’s offices would not have fallen within the ambit of

the manner of cancellation stipulated in the agreement. There was also no effort on the defendant's part to support his claim with evidence from the District Officer in question or to explain why his evidence could not be availed. The first defendant's argument that the sale floundered after the signing of the agreement does not address the question of why the seller would have expected cash upfront when the seller knew fully well that the property could not be transferred without paying off the mortgage bond. Moreover, the existence of the mortgage bond was not brought to the attention of the purchaser.

In addition, a key action which puts the defendant's version in doubt regarding the cancellation of the agreement is that the plaintiff was given vacant possession three months after the agreement and continued in occupation for approximately 10 years before being initially dispossessed by the defendant in 2009. If indeed the agreement was cancelled before the ink was dry it makes no sense why the plaintiff would have been granted vacant possession. The defendant's assertion that the plaintiff's husband insisted on taking occupation for a minimum of ten years to recoup his costs also makes little sense if he was the one who had breached the agreement by not paying. The first defendant's assertion that he could not chase up the matter as vigorously as he has since done from 2009 because hitherto he was away working in Botswana over the years, does not absolve him since his actions would not accord with those of a person dealing with wrongful dispossession under the circumstances described.

The defendant also made the point that the plaintiff paid off the mortgage without his consent. This is not a case in my view where the plaintiff is seeking compensation for having acted as a *negotiorum gestor* - a type of spontaneous agency in their affairs without their consent. Its requirements are the management of another's affairs which is not authorised by the principal (*dominus negotii*) who is generally unaware of the intervention. The person so acting (*the gestio*) generally expects to recover their expenses though not their labour. Also the intervention must be useful when it was carried out. In my opinion this case is different in that it is not compensation which is being sought. The basis for the quest for transfer of the property is the Agreement of Sale - a sale which could not be taken to its logical conclusion because the property remained encumbered by a mortgage bond. Once a valid sale was concluded, it was within the purchaser's power to do everything possible to facilitate its transfer. Besides no objection seems to have been raised by the seller at the time that it was made known to her that the mortgage bond had been paid off without her authority. But even if the first defendant's argument is accepted at face value that the payment was made

against the wishes of the seller as debtor (*dominus*), by purchaser for his own benefit (*Sui lucri causa*) such a payment can be sanctioned. As stated by VAN ZYL JP in the South African case of *Standard Bank v Taylam (Pty) Ltd* 1979 (2) SA p 383 at p 392:

“The circumstances in which payment was made contrary to the wishes of the *dominus* are always an important factor in determining whether payment was or was unjustly done. The law does not allow rights to be acquired by meddling indiscriminately in the affairs of another, but meddling is allowed in circumstances where such meddling is necessary in order to do justice between man and man. Where there is meddling in the affairs of another in own interest against the expressed wishes of the other, it is even more important that the meddling should not be gratuitous, but that both parties have a real interest in the matter that is meddled with. It is not only the meddling that must not be gratuitous, but there must not be a gratuitous disregard of the wishes of the *dominus*.”

In *casu*, that the property was mortgaged is not in dispute. The mortgage would have needed to be discharged before the transfer could take place. It was with this in mind that the plaintiff, as purchaser, paid off the balance owing. In my opinion it was the Agreement of Sale which introduced a relationship which permitted the buyer to take steps to settle the mortgage debt since transfer of the property was conditional upon its payment. The payment was not made in his own right as principal since the property was registered in the seller’s name. However, it was certainly made in the purchaser’s own interest. Its purpose was to discharge a debt owing for the mortgage. Indeed, payment of the mortgage bond had the effect of extinguishing the debt thereby freeing the property for transfer. Once the payments to discharge the debt had been effected, the purchaser’s expectation was not for the debt to be reimbursed but for the transfer to be effected. It is therefore, these circumstances under which the plaintiff came to pay the debt of the seller that are critical to the resolution of this issue.

There is no evidence that the seller took any action to refuse payment being made on her behalf at the time or even thereafter when she received two letters from the would have been conveyancers *Gollop and Blank* regarding the payment. The letter dated 13 July 2001 addressed to the seller Mrs Emily Chanetsa which was submitted by the plaintiff is exh 4 reads in part as follows:

“Re: transfer stand 1859 Tynwald South Township of stand 1042 Tynwald South Township

We are pleased to advise you that your mortgage bond in favour of C.A.B.S over the above property has been paid off in full by Mr Munjayi and the property can now be transferred.

Can you please arrange to come to our offices at 83 Second Street in order to sign the necessary documents so that we can proceed with registering the transfer?"

Again on 24 September 2002 the conveyancers write another letter to the seller produced as exh 5 which in part was to the following effect:

"Re: Cancellation bond info C.A.B.S:
Transfer Stand 1859 Tynwald South to T Munjayi

As will recall your CABS bond has been paid off in full by Mr Daniel Munjayi and we are thus able to start the transfer of the property

In this connection we enclose the following documents for your attention:

1. Power of attorney to make transfer: please sign at the foot of the page where indicated with pencil crosses and have your signature witnessed by two persons.
2. Declaration by seller: also for signing at the bottom of the page, add the date and again arrange for two persons to witness your signature."

There was no challenge to these letters by way of stating that the agreement had long since been cancelled or indeed querying why the payment had been made in terms of a non-existent agreement. There was also no challenge to the effect that no transfer could take place because no money had ever exchanged hands or to the effect that the purchaser was staying there free of charge without having ever paid the seller. Instead the seller simply chose not to effect transfer and to ignore the correspondence. What is clear is that the seller took no action to effect the transfer not because of the cancellation of the agreement otherwise they would have hollered loud and clear at this point. What seems likely is that as the economy was then in free fall by 2002 and property prices had increased there was no inclination to part with the property at this point. The failure to honour the agreement may thus have had more to do with this sense of comparative loss rather than that the purchase price had not been paid to the seller. There is no evidence that the cheque was dishonoured or that payment was not made by the agent to the seller. In fact, the seller's action in granting vacant possession seems to bolster the argument that payment must have been made pending the transfer, hence the purchaser was allowed to reside in the property. It is unlikely that any

reasonable person would allow a purchaser to obtain vacant possession without receiving the purchase price, let alone for the period in question which is close to 13 years if one takes into account that the purchaser regained possession in 2009 before being evicted again in 2012. In my view, all this works strongly against the defendant's assertions that the agreement had been cancelled or indeed that the purchase price was not paid. According to the first defendant his mother was then residing in the rural areas by 2002 and it was him who was managing her affairs. It is him who has refused to transfer for reasons which are not supported by the evidence.

The first defendant has the obligation to pass transfer of ownership of the property in question. The first defendant and all those persons obtaining title through him must vacate from the property in question because the evidence supports the view that it was duly sold and there are no indications of the purchase price not having been paid. In *Wang Enxiang v Shi Yongchun & Ors* HH336/12 delivery of the title deed was ordered where the evidence showed that the purchase price had been paid.

Taking into account all of the above, in the result, judgement is granted in favour of the plaintiff as against the defendant as follows:

1. The first defendant is ordered to pass transfer of Stand 1859 Tynwald Township Harare into plaintiff's name within 30 days of service of this order upon her, failing which the Deputy Sheriff be and is hereby authorised and directed to sign all documents and take the necessary steps to pass transfer of the said property to the plaintiff.
2. The first defendant and all those persons obtaining title through him must vacate the property in question, Stand 1859 Tynwald Township, Harare within 30 days of the service of this order failing which the Sheriff or his lawful deputy is authorised to evict the same from the property.
3. The first defendant shall pay the costs of suit.

Chatsanga & Partners, Plaintiff's Legal Practitioners
Muronda & Muyangwa, 1st Defendant's Legal Practitioners