Judgment No. SC 72/02
Civil Appeal No. 27/99

PHILLIP STEVEN KENEE v

(1) MARGOT KENEE (2) PATRICIA DOREEN WATT

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, SANDURA JA & MALABA JA
HARARE, MARCH 18 & SEPTEMBER 16, 2002

F Girach, for the appellant

E Matinenga, for the respondents

MALABA JA: On 26 September 1997 the first respondent instituted proceedings in the High Court, claiming against the appellant a decree of divorce, custody of the three children of the marriage, an order of maintenance for the children and distribution of certain assets. The second respondent, who is the first respondent's mother, was joined in the same action as the second plaintiff and claimed against the appellant an order that he transfer into her name the undivided half-share in Stand 18, Newlands Township, commonly known as No. 10 Princess Drive, Newlands, Harare ("the property") which he owned in equal shares with the first respondent.

In addition to granting the first respondent what she claimed against the appellant, the High Court, in a judgment delivered on 20 January 1999, gave him the right of access to the children to be exercised "every alternate school holiday and

alternate public holidays". The court *a quo* also ordered the appellant to transfer his undivided half-share in the property to the second respondent within sixty days of the judgment, failing which the Deputy Sheriff was ordered to take all such steps on his behalf and sign such documents as were necessary to effect the transfer.

The appellant appealed to this Court against the order granting him the right of access to the children on the ground that it should have extended to alternate weekends. He also appealed against the order that he transfer the undivided half-share in the property to the second respondent on the ground that the learned trial judge misdirected herself in finding that the second respondent was entitled to the transfer.

The parties reached an agreement before arguments on the ambit of the right of access were heard. The order of the court *a quo* was to be amended so that the appellant's right of access to the children included alternate weekends. The only question to be considered on appeal was therefore whether the second respondent established entitlement to the order that the appellant transfer his undivided half-share in the property to her.

The background facts are these. The appellant and the first respondent married each other on 13 June 1987. They lived in rented accommodation until the first and second respondents jointly purchased the property on 28 February 1989. The purchase price of $125 000.00 was paid by a deposit of $50 000.00 raised from proceeds of the sale by the second respondent of her flat. The balance was raised

through a loan from Beverley Building Society on a mortgage bond registered against the property.

It is not in dispute that the appellant did not make a direct financial contribution to the purchase price. He paid the transfer fees and agreed to complete the construction of a cottage on the property for the use of the second respondent.

The parties agree that as the family grew bigger the house which had two bedrooms became small, giving rise to an urgent need for its extension. The appellant pulled down the corrugated iron roof and put in its place an asbestos roof. He then refused to carry out any further repairs, extensions or renovations to the house unless he had a share in the ownership of the property. At that time, some of the rooms had no ceiling. There were no tiles in the bathroom, kitchen and walls. The walls were not painted and the floors needed redoing. There was no running water. As the repairs, extensions and renovations were urgently needed to make it habitable, the first respondent persuaded the second respondent to transfer her undivided half-share in the property to the appellant to enable him to do the work.

The second respondent entered into an oral agreement with the appellant, in terms of which she bound herself to transfer her undivided half-share in the property to him. He in turn undertook to carry out the necessary repairs, extensions and renovations to the house. It was a term of the agreement that the second respondent would have a life usufruct in the cottage. Each of them, that is to say, the appellant, the first and the second respondents, were to pay one-third of the

monthly expenses relating to the maintenance of the property including mortgage instalments, water and electricity.

The agreement was reached on 12 September 1995 and on 20 December 1995 the second respondent transferred her undivided half-share in the property into the appellant's name. In order to raise the money for the materials and labour required to carry out the repairs, extensions and renovations to the house, the appellant and the first respondent obtained a loan from Beverley Building Society on a new mortgage bond which replaced the old one raised by the first and second respondents. To place more cash at the disposal of the appellant to finance the necessary improvements to the house, the second respondent gave him an amount equal to twenty-four months of her one-third contributions to the monthly expenses for the maintenance of the property.

The work the appellant undertook to do included the following –

> He was required to fit ceilings in most of the house; install and connect the kitchen sink; complete the pantry; fit kitchen cupboards and floor tiles; do up the back verandah; fit the bathroom basin and tiles; fit and reconnect the washing machine; carpet the new bedroom extension; and generally renovate the house, including painting.

The marital relationship between the appellant and the first respondent, however, irretrievably broke down, resulting in her instituting the divorce proceedings. In the declaration in support of her claim for an order that the appellant re-transfer the undivided half-share in the property into her name, the second

respondent made the allegation that the appellant had failed to carry out the repairs, extensions and renovations to the house in terms of the agreement of transfer. She alleged that as a result of the breach of contract by the appellant she was entitled to cancel the agreement and gave notice of the cancellation in the summons.

The first point taken by Mr *Girach* on behalf of the appellant was that the evidence led in the court *a quo* did not establish breach of contract by the appellant.

I am unable to accept the submission because a perusal of the record of proceedings shows that breach of the agreement by the appellant was established. The following extracts from the evidence-in-chief given by the first and second respondents disprove the contention:

> "Q. Now, this house, let us forget about the cottage, have you finished renovating this house as of now? A. Oh, no. It is in a terrible condition.
>
> Q. What is terrible about it? A. Most of the house has got no ceiling. There are no tiles on the walls and the kitchen or in the bathroom. It is totally unpainted and it needs a lot of maintenance.
>
> Q. Was any time limit given to your husband to effect renovations to the main house? A. There wasn't a specific time limit but it was assumed at the time that it would be done as quickly as possible, which is why we took a bond to help speed things up and also why my mother paid two years one-third contributions in advance to also give us the cash to finish the renovations then and there."

Under cross-examination the first respondent made it clear that the appellant knew that he had to complete the improvements to the house within a reasonable time as there was an urgent need to put the house into a reasonably habitable state.

The second respondent gave the following answers to questions put to her:

> "Q. Has the main house been built to expectations? A. No. I am sorry, I should have realised that. No, the main house has not been completed. It has mostly no ceilings."

She said that it was not in the contemplation of the parties that the appellant would take two years to perform his obligations. It was her evidence that the parties expected that the work would be commenced and completed "as quickly as possible".

The learned trial judge found the first and second respondents to be honest and credible witnesses. She accepted their evidence and found that it had established breach of contract by the appellant. In the opinion of the learned trial judge, what the appellant did constituted a repudiation of the contract entitling the second respondent to cancel the agreement. She said:

> "It is not in dispute that while the second plaintiff (now the second respondent) upheld her side of the agreement, that is, the transfer of a half-share in the property to the defendant (now the appellant), the defendant failed to uphold his side of the agreement. He concedes that the renovations to the main house had not been completed three years after their agreement. … In my view, the defendant has breached a fundamental term of the contract. Whether his breach was deliberate or occasioned, as seems to be the case, by financial constraints is neither here nor there. He has breached the agreement. … The second plaintiff has chosen for practical reasons connected with concern for security in her old age not to claim an order to compel the defendant to uphold his side of the agreement but to claim back her half-share."

In my view, the reasoning of the learned trial judge cannot be faulted. Although the appellant's case on appeal was based upon the acceptance of the fact that there was an agreement between him and the second respondent, the terms and conditions of which were as adduced to by the respondents, his defence to the action

in the court *a quo* was a complete denial of the existence of the agreement of transfer. In denying the existence of the agreement, the appellant provided the court *a quo* with additional evidence of his repudiation of the contract. A contractant who denies the existence of a valid contract repudiates that contract just like one who disputes its terms. *Stachan & Co Ltd v Natal Milling Co (Pty) Ltd* 1936 NPD 327; *Walker Fruit Farms v Summer* 1930 TPD 394.

The first point taken by the appellant fails.

The second point taken by Mr *Girach* was that the cancellation of the contract by the second respondent was invalid because she did not first place the appellant *in mora* by demanding performance of the agreement by a specific date. There was, of course, no specific time for the performance of the contract fixed by the parties. Where there has been a repudiation of a contract in which time for performance is not fixed and the innocent party elects not to be bound by the contract any more, there is no need to place the other party *in mora* because the innocent party will have acquired the right to cancel the contract from the repudiation. D J Joubert makes the point at p 213 of his book *General Principles of the Law of Contract* that:

> "The fact that the debtor repudiates will not place him *in mora debitoris* before the date for performance has arrived. Where there is no time fixed for performance repudiation will not relieve the creditor from the necessity of giving an *interpellatio* in order to place the debtor *in mora* but this will usually not be necessary in order to protect his rights, because the creditor will by virtue of the repudiation acquire the right to cancel the contract, which is usually the result that he desires to achieve by the demand for performance and a notice of rescission."

See also *Stewart Wrightson (Pty) Ltd v Thorp* 1977 (2) SA 943 (A).

At the time the notice of cancellation of the contract was given to the appellant on service upon him of the summons in which it was contained, he had no intention of performing the obligations under the contract. He confirmed the repudiation when he denied in his plea the existence of the contract. No useful purpose would be served in the circumstances in requiring the second respondent to first demand from the appellant performance of the contract he had no intention of performing before she cancelled it. She had acquired the right to cancel the contract from its repudiation by the appellant.

The second point taken by the appellant must also fail.

In the result, save for the amendment of the order of the court *a quo* granting the appellant the right of access to the children to include the words "and alternate weekends", the appeal is dismissed with costs.

EBRAHIM JA: I agree.

SANDURA JA: I agree.

Lofty & Fraser, appellant's legal practitioners

Kantor & Immerman, respondents' legal practitioners