

DISTRIBUTABLE (26)

Judgment No. SC 29/03
Civ. Appeal No. 29/02

YVONNE RITA MASAMVU v TARISAYI MARY CHITARE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & MALABA JA
HARARE, SEPTEMBER 22 & NOVEMBER 4, 2003

F G Gijima, for the appellant

I E G Musimbe, for the respondent

CHEDA JA: The parties in this case entered into a written agreement of sale of immovable property with all the usual provisions for that type of agreement.

The agreed purchase price for the property was \$700 000.00. The purchaser (the respondent) was to obtain a 100% bond from Stanbic Bank. There were other special conditions on the back of the page. The relevant part of the special conditions read:

“This sale is conditional upon the purchaser being offered a loan in principle or otherwise on the usual terms and conditions from Stanbic in the sum of \$700 000.00 or such lesser amount as may be acceptable to the purchaser, not later than 09/05/2001. Unless an extension of this period is agreed to by both parties, such loan to be secured by means of a first mortgage bond registered over the property hereby sold. The purchaser undertakes to apply for such loan by not later than 09/04/2001 and agrees not to withdraw such application made and further agrees to accept such loan when offered.”

The respondent was able to secure the above loan by 19 April 2001 as indicated in the correspondence. She says despite demand the appellant, without just

cause, deliberately breached the agreement by refusing, neglecting and/or failing to sign the transfer papers. She made an application in the High Court to compel the appellant to comply. She succeeded.

The appellant has now appealed against the order of the court *a quo* in which she was ordered to do all things necessary to enable transfer to be passed to the respondent. In her grounds of appeal the appellant stated:

- “(1) The learned judge erred in holding that the matter in *casu* is distinguishable from the precedent set by this Honourable Court in *Marisa v Madondo* 1992 (1) ZLR 276 (S) and proceeded to grant an order against the appellant when in fact the matter is on all fours with the present case.
- (2) The learned judge erred in holding that the appellant had no reciprocal duty to ensure that transfer of the immovable property is effected within a reasonable time, more so when this was a ‘commercial transaction involving the sale of the property whose value on the market fluctuates’.”

The appellant seeks an order setting aside the order in case no. HC.9336/01 and substituted by an order declaring her entitled to cancel the agreement of sale.

In his heads of argument, Mr *Gijima* raised the following points:

- “1. That the respondent failed to notify the appellant that she had secured a loan and that such failure gave the appellant the right to regard the agreement as cancelled.
2. That the trial court should have followed the precedent set in *Marisa’s* case 1992 (1) ZLR 276.”

I shall now deal with the issues raised by the appellant.

Correspondence filed in the record shows that the respondent obtained the loan on 19 April 2001, that is, about nineteen days before the deadline set in the agreement of sale. On 25 April 2001 she paid the fees to a firm of conveyancers, Messrs Kantor & Immerman, for the registration of the bond in favour of Stanbic. This is admitted by the appellant. There is therefore no question of the respondent failing to obtain the loan within the stipulated period.

However, having admitted this, the appellant argues that the fact that the respondent obtained the loan in time was of no use to the appellant if she was not so informed.

It is not clear on the record how the conveyancers were appointed. However, it is clear that the respondent was advised that they were doing the transfer. That is why Messrs Kantor & Immerman wrote to the respondent, asking her to pay to them certain fees and the stamp duty. In requesting the above, Messrs Kantor & Immerman would have been acting for, or as agents for, the appellant, or even if they were not appointed by the appellant, the respondent would have been entitled to regard them as agents for the appellant in the transfer.

In view of this, the respondent would have no reason to believe that they could go so far as to work on the transfer without the knowledge of the appellant.

The respondent also stated that whatever made Messrs Honey & Blanckenberg delay cannot be imputed to her, as these were the conveyancers chosen by the seller (the appellant).

It was submitted on behalf of the appellant that this case is on all fours with the case of *Marisa v Madondo* 1992 (1) ZLR 276 (S). I do not agree.

In *Marisa v Madondo supra* the conveyancers were appointed to act for the respondent in drawing up the deed of transfer. In the present case, the conveyancers were not acting for the respondent. The agreement says the purchaser shall deposit the costs of transfer with the seller's conveyancers. The conveyancers were therefore acting as agents for the seller.

In *Marisa v Madondo*, Marisa, having heard nothing about payment of the purchase price or about the purchaser having obtained a loan, sent a telegram giving notice to cancel the sale if he heard nothing from the purchaser within the following seven days. In this case, the agreement clearly provided what the seller was to do in the event of a breach. Instead of going by what was agreed to, the seller did nothing. The required notice before cancellation was not given. In fact there was no breach on the part of the purchaser and therefore no reason to cancel.

It follows that even today the agreement was never cancelled. It is still open to the purchaser to move for transfer of the property as the agreement was never cancelled.

Where parties enter into a written agreement with clear and specific provisions to be followed in the event of a breach by either party, and even state that the agreement constitutes the entire contract between them, no party can be allowed to

bring in additional or different conditions from those agreed, especially where such changes would prejudice the other party to the agreement.

Accordingly, I hold that the agreement of sale was not cancelled. It is still valid. The purchaser is therefore entitled to move for transfer of the property to herself. I see no fault in the decision of the court *a quo* and it is upheld.

The appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

F G Gijima, appellant's legal practitioners

I E G Musimbe, respondent's legal practitioners