

DISTRIBUTABLE (25)

Judgment No. SC.27/06
Civil Appeal No. 383/03

(1) ZIMBOS (PRIVATE) LIMITED
(2) ASSETFIN (PRIVATE) LIMITED

v

ELLAH MBAIWA

SUPREME COURT OF ZIMBABWE
CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, SEPTEMBER 13, 2005 & JULY 19, 2006

O C Gutu, for the appellants

H Simpson, for the respondent

MALABA JA: This is an appeal from an order of costs against the appellants made by the High Court on 10 December 2003 on an application for an order of transfer of three stands into the respondent's name. The contention on appeal was that the respondent was not only partially successful in her claim; her success was based on the version of events put forward by the appellants. The grounds of appeal were set out as being that;

- “1. The learned Judge in the court *a quo* misdirected herself by ordering the appellants to pay the respondents costs of costs of suit in circumstances where the appellants' version of events had largely been accepted as the correct version of the court *a quo*.
2. The court *a quo* misdirected itself by granting an order of costs in favour of the respondent when a proper reading of the

judgment clearly establishes that the respondent had largely failed in her claim to also be granted transfer of Stand 697 of Subdivision Lot 2A Bluff Hill Townships as well as for a refund of the sum of \$647 238,86”.

It was argued that the respondent ought to have been ordered to pay the costs of the applications.

The facts are these. The respondent entered into three agreements with the appellants in terms of which she agreed to purchase stand numbers 810, 811 and 697 of Subdivision Lot 2A Bluff Hill Townships. The agreements were signed on 12 October 2001. She was obliged to pay the deposit for the properties on the day of signature. The balance of the purchase price was to be paid from a loan she had to secure from a bank within seven days of the date of signature of the agreements. The total purchase price for the three stands was \$1 518 804.

The respondent did not secure the loan from a bank within the stipulated time limit. She paid certain sums of money towards the balance of the purchase price for stand 810. It was a term common to each agreement that should the respondent default in the payment of the purchase price the appellants had to give her written notice to rectify the breach within seven days failing which claim immediate payment of the full balance of the purchase price or cancel the agreement.

On 21 January 2002 a written notice was given to the respondent to remedy the breach within seven days failing which the agreements in respect of stands 811 and 697 would be cancelled. On receipt of the notice the respondent paid to the appellants the sum of \$1 220 043.90 by a bank cheque on 31 January 2002. The

payment brought the total amount paid to \$2 166 042.86. This was \$647 238.86 over the purchase price for the three stands.

Notwithstanding the fact that the respondent had purged her breach within seven days of date of the written notice a letter was written on behalf of the appellants on 4 February 2002 cancelling the agreements. When the respondent demanded transfer of the three stands on the ground that the purported cancellation of the agreements was invalid and threatened court action should her demands not be met within seven days of receipt of her letter, the appellants insisted that the agreements had been validly cancelled and promised to defend any action to be instituted by the respondent.

On 23 August 2002 the respondent made an application to the High court for an order of transfer of the three stands. The opposing affidavit filed on behalf of the appellants alleged that she had no right to the transfer of the stands as the agreements of sale on which she based the claim had been cancelled. It was alleged that on compassionate grounds the appellants had allowed her to pay for stands 810 and 811 only after the date of cancellation. In other words it was being denied on behalf of the appellants that the respondent had paid the full purchase price for the three stands. It was even denied that the bank cheque had been received on behalf of the appellants. It was further alleged that the respondent had no right to the transfer of the stands because they were subject to a subdivision which was still to be authorised.

It is important to quote from the opposing affidavit to show the attitude the appellants adopted towards the respondent's claim.

“Ad para 9:

It must however be noted that as of the 4th February 2002 the applicant had failed to meet her financial obligations hence the decision to terminate the agreements in respect of two stands and appropriate the amounts paid to finance the purchase price of one stand being stand number 810. The cancellation was legitimate and in terms of the agreement in view of the fact that applicant had failed to remedy her breaches.

10.2 If anything the applicant should have been grateful in that despite her default and out of mercy a subsequent arrangement was entered into wherein it was agreed that,

- (a) The cancellation of agreements would only become effective in terms of stand number 697.
- (b) The applicant pay the balance in respect stands 810, and 811 together with interest calculated from the 10th October 200 up to date of payment”.

The appellants clearly took the position that the cancellations of the agreements in respect of the three stands was valid. According to them the respondent had no right of transfer to enforce in court. They went on to oppose the application for the order of transfer of stands 810 and 811 notwithstanding the averment that on compassionate grounds she could have the stands transferred into her name.

On the order sought by the respondent the opposing affidavit stated:

“Ad para 15:

I take note of the orders being sought by the applicant in this paragraph and I wish to highlight the following factors:

- (a) Whilst it is every person’s right to approach the courts for relief it is my submission that such approach should be of

unquestionable *bona fides* and in this case the applicant is seeking to enforce a right which she clearly does not have. As I have shown above the applicant has always been in breach of the agreement from its inception. She has been granted numerous indulgences which she failed to honour and now seek to enforce same as rights.

The respondent legitimately cancelled the agreements on the basis of the applicant's breach which is not in doubt and therefore had, and still has no legal obligation to transfer any one of the properties to the applicant.

- (b) It must also be noted that the applicant agreed that she was in total breach of the agreement hence her plea that she should at least be allowed to have only two stands instead of three to which the respondents agreed, not because the applicant was entitled to same but as a result of the humane face which the respondents have to the situations of the applicant.
- (c) The agreement was that after the cancellation the applicant would pay the balance and interest outstanding on the two properties which she did. One wonders why if she had such a right, she failed to tender payment in respect of the plot in question. The whole application is ill conceived and an after thought.
- (d) The Respondents have no objections in transferring stand Number 811 and 810, however, this is subject to a certificate of compliance having been issued by the responsible authority in terms of the subdivision permit. The Respondents cannot transfer stand 697 as the agreement was lawfully cancelled.
- (e) ...
- (f) I humbly submit that application and orders sought by the applicants should be dismissed with costs as the whole application was not necessary in the first place".

Far from conceding that the respondent had a right to transfer of the stands the appellants maintained that she had no such right as the agreements on which her claim was based had been validly cancelled. They were of course equivocal as to their position in respect of stands 811 and 810 but were clear that if they were to transfer these stands to her it would not be because they recognised a right in her to the transfer but that it would be out of compassion for her. It is quite

clear that in the face of such equivocation on the part of the appellants on her right to the transfer of the stands the respondent had no choice but to apply to court for the determination of her rights. The appellants compelled her to incur the costs of the application for the order of transfer.

Although it was alleged on behalf of the appellants that an agreement was reached after the cancellation of the original agreements of sale, that the respondent would pay for stand 810 and 811 there was no evidence of such an agreement. There would have been no need for the appellants to declare that the respondent had no right to claim transfer of the two stands. It appears to me the respondent was substantially successful in her claim. The court *a quo* had a discretion to award her the costs because the attitude of the appellants was clearly that she had to prove her entitlement to the order of transfer.

On the other hand the respondent failed on her claim for the transfer of stand 697 and the refund of \$647 238.86. In holding that there was a dispute of facts which could not be resolved on the papers in respect of the claim of transfer of stand 697 and the refund of \$647 238.86 the court was effectively saying that she should not have proceeded by way of an application. The court *a quo* accepted the appellants' contention that they were forced to incur costs defending a claim which ought not to have been brought to court on an application. It was unfair to order the appellants to pay "costs of suit" in the circumstances when the respondent should have been ordered to pay their costs in respect of the unsuccessful claim for the transfer of stand 697 and the refund of \$647 238.86. The applicants have been partially successful on appeal.

The appeal succeeds with costs to the extent that the order of costs of the court *a quo* in para 3 is set aside and substituted with the following:

- “3. That the 1st and 2nd Respondents pay the applicant costs in respect of the claim of transfer of stands 810 and 811.
4. The claim in respect of the transfer of stand 697 and the refund of the sum of \$647 231.86 be and is hereby dismissed with costs”.

CHEIDA JA: I agree.

GWAUNZA JA: I agree.

Messrs Gutu & Chikowero, appellant's legal practitioners

Messrs Mushonga & Associates, respondent's legal practitioners