

Judgment No. SC 65/03  
Civil Appeal No. 146/03

**(1) FORTUNE CHARUMBIRA (2) PRISCILLA CHARUMBIRA V(1)JOHN WILKE&(2) STACEY CHANDOS WILKE (3) THE REGISTRAR OF DEEDS**

SUPREME COURT OF ZIMBABWE  
SANDURA JA, CHEDA JA, & GWAUNZA JA  
HARARE, NOVEMBER 27 2003 & MARCH 2004

*RY Phillips*, for the appellants

*AA Brooks*, for the respondents

GWAUNZA JA: In the *court a quo*, the respondents successfully sought an order;

- setting aside the registration of the transfer to the appellants of certain immovable property under Deed of Transfer 14076/2001.
- authorising the Registrar of Deeds to transfer the property back to the respondents,
- compelling the appellants to effect certain payments to the respondents in respect of occupational interest and as reimbursement of what was paid to the Estate Agent concerned and that the appellants should pay the costs of suit.

The respondents were aggrieved by the judgment of the High Court and now appeal against it.

The facts of the matter are largely common cause. The appellants are married to each other, as are the respondents. On 17 August 2001, the parties signed an agreement of sale, in terms of which the respondents sold to the appellants certain immovable property situated in Harare, for \$8 700 000.

A deposit of \$870 000 was paid, upon signing of the agreement, with the balance, according to the agreement, being payable upon transfer. Before the balance was paid, a Secretary employed by the legal practitioners for the respondents, by error, had the registration of the transfer of the property into the appellants' names, effected. The said legal practitioners then withheld the new Title Deeds and made several demands, from the appellants, for payment of the balance of the purchase price.

The appellants at no time disputed that this balance was duly owing and outstanding. Their only defence was that the first appellant needed time to travel to Tanzania, where he held an offshore account, in order to access the relevant funds and then forward them to the respondents. The first appellant failed twice to meet the deadlines that he himself had set, for this course of action. The appellants having failed by the extended deadline to effect the payment, in question and after having been placed *in mora* on 4 February 2002, the respondents cancelled the agreement in question. This was on 9 April, 2002.

It should be noted that the parties, on the same day that they signed the main agreement of sale, signed another one which simply expressed the purchase price in United States (USD) dollar terms. According to that agreement the total purchase price would be USD 30 100. The deposit of USD 3000 was to be paid upon signing while the balance of USD 27 100 was to be paid upon transfer. The appellants do not dispute the respondents' assertion that the parties' intention was that the two agreements were to be considered as alternative to each other, so that payment under one would extinguish the other agreement. The learned trial judge correctly noted that the court had not been called upon to determine the issue of which of the modes of payment – local or foreign currency – was the one to which the parties were to be held. Nothing therefore turns on this issue.

Even after the respondents filed this application in the *court a quo*, the appellants did not dispute that the balance of the purchase price was still owing. In paragraph six of the appellants opposing affidavit, the first appellant stated as follows:

“The applicants should accept payment of the purchase price in local currency, payment of which will be made within fourteen (14) days of filing this notice of opposition. The only reason why the balance of the purchase price remains outstanding is that I do not have funds to travel to Tanzania and pay the balance in foreign currency from my offshore account.”

The appellants again failed to honour the promise to pay the relevant within fourteen days of the filing of their notice of opposition. The appellants thus fully appreciated the fact that they had committed a major breach of the agreement of sale. Since the agreement is very clear in clause 12 as to the consequences of such a breach, I do not believe the appellants did not appreciate the same.

Despite this appreciation, or because of it, the appellants sought to rely on technicalities in order to evade liability in terms of the respondents' claims. In her judgment the learned trial judge dismissed the various technical defences that the appellants sought to raise. She found no merit in the appellants contention, which they have cited as a ground of appeal *in casu*, that they had not been properly placed *in mora*.

The learned trial judge noted in this connection, at page eight of her judgment that;

“... the absence of protest by the respondents to the letter of cancellation or for that matter the previous correspondence warning of the consequences of failure to pay by the agreed date ... is suggestive of acquiescence on the part of the respondents. The respondents have, it is noted, not argued that there was no due notice given prior to cancellation.”

The learned judge also dismissed as devoid of merit the respondents' somewhat belated reliance on the principle of election. I find no fault with her conclusion that, having perused the affidavits of the parties, she found nothing to suggest there was at any stage an election by the respondents to abide by the agreement in the event that the respondents failed to pay the amount outstanding. By submitting in one of their grounds of appeal that the *court a quo* erred in not finding in their favour on this point, the appellants do in fact persist with this defence. In their heads of argument, respondents' counsel in my view effectively discredits this argument as follows:

“... clearly, in its letter to the appellants on 4 February 2003, first and second respondents elected to proceed with cancellation of the sale in the event that the appellants did not make good on their breach of the payment of the balance of the purchase price. Although it was later agreed between the parties that the appellants will be given a certain amount of extra time to pay the balance of the purchase price, (see record 18), the contents of the *mora* letter of 4 February 2003 make it abundantly clear that, failing payment, the election of the first and second respondent as a result of the breach by the appellants was to proceed with cancellation of the sale. This they were clearly entitled to do by virtue of Clause 12 of the “Pam Golding” Agreement.

The appellants' submission that because the respondents had not tendered restitution in their founding papers, their election to cancel was of no force or effect, also failed to impress the learned trial judge. Again, I do not find any fault with her reasoning. The respondents correctly contended that they were not obliged to tender restitution of any sums paid as Clause 12 of the agreement of sale entitled them to “retain as and by way of Rouwkoop” all sums of money which may have been paid or deposited by the purchaser, as security.

In their heads of argument, the appellants indicated they would not advance any argument in respect of their three original grounds of appeal. In one of these grounds the appellants had challenged the correctness of the learned trial judge's order that they pay the amount claimed by the respondents in terms

of the agreement, as occupational interest. I will take the appellants' assertion in this respect as an abandonment of that ground of appeal.

The papers before the Court point to a distinct lack of a genuine defence on the part of the appellants. What is more, it is in my view evident that the appellants fully appreciated their predicament. Their persistence, in the face of all this, with their opposition to the respondents' claim smacks of an intention to cause as much delay as possible in the finalisation of this matter. The learned trial judge noted correctly in my view, that the appellants sought to rely on additional and unspecified agreement between the parties, contrary to S 17 of the agreement of sale. I agree fully with her finding to the effect that the appellants were clearly lacking *in bona fides*, and that they "blew hot and cold" in the face of admitted facts.

I find in all the circumstances that the appeal is devoid of merit and must therefore fail.

It is in the premises ordered as follows:

"The appeal is dismissed with costs."

SANDURA JA: I agree.

CHEDA JA: I agree.

*Messrs Dube, Manikai & Hwacha*, appellant's legal practitioners

*Messrs Costa & Madzonga*, respondent's legal practitioners