

REPORTABLE (138)

Judgment No. SC. 148/04

Civil Appeal No. 111/04

(1) Desmond Charles Wood (2) Anna-Marie Wood
V (1) Elwyn Mudungwe (2) The Registrar Of Deeds

SUPREME COURT OF ZIMBABWE

SANDURA JA, MALABA JA & GWAUNZA JA

HARARE, OCTOBER 12, 2004 & SEPTEMBER 22, 2005

R M Fitches, for the appellants

A Mugandiwa, for the first respondent

No appearance for the second respondent

MALABA JA: This is an appeal against an order of the High Court, granted on 24 September 2003, directing the appellants to sign documents for the transfer of Stand 13270 Salisbury Township to Tonderai Daiton Tela within ten days of service of the order upon them failing which the Deputy Sheriff, Harare, was authorised to sign the transfer documents on their behalf. The appellants were also ordered to pay the costs of the application for the order granted jointly and severally, the one paying the other to be absolved.

The facts are these. On 28 August 2001 the appellants, who were husband and wife, entered into a contract with Tonderai Daiton Tela in terms of which they sold to him Stand 13270 Salisbury Township situated in the District of Salisbury ("the property") for \$5 000 000. Clause 2.1 of the agreement of sale provided that:

"The price shall be paid free of deduction to the seller in the manner set out in the Schedule."

As to the manner of payment, the parties agreed to:

- “1. The Purchaser paying the Sellers a deposit of \$3 375 000 (Three million three hundred and seventy-five thousand dollars) on signing this Agreement of Sale.
2. The Purchaser paying a further deposit equivalent to the Agent’s commission of \$250 000 (Two hundred and fifty thousand dollars) to the Agent.
3. The balance of the purchase price amounting to \$1 500 000 (One million five hundred thousand dollars) shall be paid by the Purchaser within six months of this Agreement of Sale, that is to say, by 28/02/2002.
4. The Agent’s Commission shall be paid by both parties in equal shares i.e. the Sellers \$125 000 (One hundred and twenty-five thousand dollars) and the Purchaser \$125 000 (One hundred and twenty-five thousand dollars).
5. The Sellers shall rent the premises at a rent to be negotiated after transfer of (the) property.”

Clause 6.1 provided that the purchase price had to be paid to Messrs Coghlan, Welsh & Guest, who were to tender transfer to the purchaser on behalf of the sellers within a reasonable time after the price had been paid in full. Messrs Coghlan, Welsh & Guest, who were the sellers’ agent, shall hereinafter be referred to as “the agent”.

The sum of \$3 375 000 was paid to the agent on 30 August 2001 and \$1 345 000 on 5 November 2001. On 11 December 2001 the purchaser paid \$280 000 and transfer fees in the sum of \$261 312.50. As of that date the purchaser had paid the purchase price of \$5 000 000 to the sellers’ agent.

On 15 January 2002 the agent sent to the sellers the following statement of account:

“ <u>By purchase price</u>	5 125 000
To provision for CGT	500 000

To Agent	250 000	
To Volinet	250 000	
To BBS' cancellation requirements	473 914	
To Cancellation Costs	890	
To Volinet	250 000	
To Tigere	4 546	
To W P Enterprise	2 389 639.87	
To Edkins	6 900	
To Donnelly	9 829	
To Rates	20 000	
To Cheque herewith	<u>858 281.13</u>	
	5 125 000	5 125 000."

On 8 February 2002 the first appellant refused to sign the transfer documents, alleging that the payments made by the agent to his creditors were deductions. He claimed that as a result of those payments there was a breach of clause 2.1 of the agreement of sale by the purchaser because the price of \$5 000 000 had not been paid to him "free of deduction". He singled out the following payments –

Capital Gains Tax	\$500 000
BBS Cancellation Requirements	\$473 914
Cancellation Costs	\$890
To Tigere	\$4 546
To Rates	\$20 000.

On 9 May 2002 the first respondent, acting on a General Power of Attorney given to him by the purchaser on 28 August 2001, applied to the High Court for an order compelling the appellants to sign the documents to effect transfer of the property to the purchaser in terms of the agreement of sale. The

founding affidavit averred that the purchaser had performed his obligations in terms of clause 2.1 of the agreement and paid the price of \$5 000 000 to the sellers "free of deduction".

The first appellant, who opposed the application, admitted that the purchase price had been paid to the agent. He did not deny that they were the sellers' agent with authority to receive payment of the money. It was his contention nonetheless that he did not receive \$5 000 000 into his pocket.

The learned judge held that the payments made by the agent out of the purchase price and singled out by the first appellant as evidence of a breach of clause 2.1 of the agreement of sale were not reasonably within the contemplation of the parties at the time they entered into the contract. In granting the order the learned judge stated:

"In my view, it is highly unlikely, if at all, that such costs or deductions were in the contemplation of the parties when they entered into the agreement of sale. In any event, in terms of the Capital Gains Tax Act [*Chapter 23:01*] capital gains tax is paid by sellers of immovable property in respect of the capital gains accrued in respect of the sales. The money owed to Beverley Building Society by the first respondent [now the first appellant] was his debt and the applicant's principal could not have been expected to pay it unless the agreement of sale specifically provided so.

... The deductions or costs that the first respondent claims ought to have been made or paid by the applicant's principal are not recorded as such in the agreement of sale. The applicant's principal thus did not breach the agreement."

In the appeal Mr *Fitches* argued on behalf of the appellants that the court *a quo* misdirected itself in construing the phrase "free of deduction" in clause 2.1 of the agreement of sale to exclude relief claimed by the first appellant from the burden of the payments made by the agent to his creditors. The contention advanced was that the phrase "free of deduction" is not usually included in agreements of sale, and the only reasonable inference was that its inclusion in clause 2.1 was to secure for the sellers freedom from the burden of

payments of their debts as reflected in the statement of account prepared by the agent so that they received \$5 000 000 in their pocket.

The question the court *a quo* was called upon to determine was one of the true construction of the language used by the parties in their written contract. When the words "free of deduction" are used in a contract of sale to impose a duty on a purchaser in respect to the payment of the purchase price they have a technical meaning. In their limited meaning they would be intended to secure for the seller relief from the burden of things that are in the ordinary sense "deductions" expected at law to be made as of right from the purchase price by the purchaser. Where things which, in the ordinary sense of the word, would not be "deductions" expected to be made by a purchaser from the purchase price are to be included in the meaning of that word the context in which it is used must be made clear. The parties must specify or enumerate the type of things they intended to be included in the concept of "deduction". In the absence of express enumeration of the things not to be deducted from the purchase price, the learned judge correctly decided, on the authority of *United Mines of Bultfontein v De Beer Consolidated Mines Ltd* 17 SC 425 that the words "free of deduction" should be confined to such deduction as might reasonably have been in the contemplation of the parties at the time they entered into the contract. In other words, the phrase would refer to things for the payment of which a purchaser would ordinarily be expected to make deduction from the purchase price.

So whether or not the purchase price should have been paid to the first appellant free from deduction for capital gains tax and personal debts, listed in the statement of account prepared by the agent, must depend upon the meaning of the words used by the parties; *i.e.* if upon the true construction of the words the court *a quo* considered that it was intended by the parties that the sellers should have the \$5 000 000 without the capital gains tax and the personal

debts listed in the statement of account being deducted, there was no rule of law to prevent effect being given to that intention.

The purchaser paid the \$5 000 000 to the agent without deduction, thereby discharging his obligation under clause 2.1 of the agreement of sale. What happened to the money once it was in the hands of the agent was a matter between the appellants and the agent. Capital gains tax is not, properly speaking, a deduction but a charge, which the legislature imposes on the person who receives capital gain. See *Gleadow v Leetham* 22 Ch.D. 269 at 272. The justification for its imposition is receipt of gain and not payment of the purchase price. The mortgage bond imposed an obligation on the first appellant and his wife to pay their debt to Beverley Building Society, and the purchaser had no obligation, in the absence of express agreement, to pay the money for them. It was important therefore for the parties to show in clear language that the word "deduction" in clause 2.1 was intended to grant to the sellers freedom from the burden of paying capital gains tax and any of the personal debts listed in the statement of account, so that the sellers received the \$5 000 000 from their agent "free of deduction".

As there was nothing in the context in which the words "free of deduction" were used to suggest that when the parties entered into the contract they treated capital gains tax and the other debts listed in the statement of account, ordinarily expected to be paid by the sellers, as coming under the meaning of "deduction", the learned judge correctly construed the words "free of deduction" in their limited meaning.

The appeal is accordingly dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Musunga & Associates, appellant's legal practitioners

Wintertons, first respondent's legal practitioners