DISTRIBUTABLE (87)

Judgment No. SC 102/02
Civil Appeal No. 341/01

CHIBHAMU MATANYAIRE v

(1) GIBSON KHANYE (2) JANNETH KHANYE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA JA & GWAUNZA AJA
BULAWAYO, JULY 24 & NOVEMBER 14, 2002

J Sibanda, for the appellant

T A Cherry, for the respondents

GWAUNZA AJA: The respondents successfully claimed, in the High Court, interest that had accrued on monies held by Messrs Coghlan & Welsh, in respect of the sale by them of certain immovable property to the appellant and costs of suit. The appellant was aggrieved by the judgment of the court *a quo* and now appeals against all of it.

The background to the dispute is as follows. The parties entered into an agreement of sale, in terms of which the respondents sold to the appellant certain immovable property known as Subdivision 12 of subdivision B of Umguza Block. Of the total purchase price of $3 000 000.00, the appellant duly paid, directly to the respondents, a deposit of $500 000.00. He thereafter paid the balance of the purchase price, not to the respondents, but to Messrs Coghlan & Welsh, legal practitioners. It is not in dispute that this payment was effected before the expiry of the deadline of

31 May 1999, a circumstance that saved the appellant the need to apply for an extension and payment of a punitive 41% per annum interest on such extended period. The agreement of sale was silent concerning to whom the payment of the balance was to be made.

Messrs Coghlan & Welsh were not randomly chosen by the appellant for this purpose. They were to attend to the transfer of the property in question to the appellant. This they were to do after settling, from the amount paid to them, certain debts of the respondents. In terms of some of these debts, caveats had been placed over the title deeds of the property by the relevant creditors. In addition to that, Coghlan & Welsh were to attend to the transfer to the respondents of certain property they in turn were buying from a third party.

In compliance with clause 6 of the agreement of sale, the appellant took occupation of the property on payment of the "final" balance of the purchase price. Transfer of the property into his name, however, only went through in October 1999. Following this event, Messrs Coghlan & Welsh paid the respondents the balance of the purchase price paid to them by the appellant, minus the payments made on their behalf, as indicated above. In addition to this, Messrs Coghlan & Welsh paid to the respondents interest on the money they held, that had accrued after the date of transfer. They withheld the interest that had accrued on the same money from the date it was paid to the date of registration of the property into the appellant's name. It is common cause that the latter amount was greater than the former. The reason for Messrs Coghlan & Welsh not paying the larger sum was their belief that such money belonged to the appellant. The appellant was of the same view.

It is this amount that forms the subject matter of this dispute, as both sides are claiming it as rightfully theirs. Messrs Coghlan & Welsh have taken the attitude that they will hold onto the disputed interest until the matter is determined by this Court, after which they would abide by the Court's decision.

The evidence before the Court establishes that, although not spelt out in writing, there was agreement between the parties that the balance of the purchase price would be paid to Messrs Coghlan & Welsh. What the parties do not agree on were the reasons for, and the implications of, such a course of action.

The appellant asserts there was agreement that the money so paid was to be kept "in trust" for him, to be released to the respondents only against transfer. He contends that since the money remained his up to the time of the transfer, he was entitled to the interest.

The respondents, on the other hand, aver that the money was paid on their behalf to Messrs Coghlan & Welsh for "practical reasons" to do (i) with the fact that, as the conveyancers, they would attend to the lifting of the caveats registered against the title deeds of the property in question, upon furnishing sufficient guarantees of payment of the relevant debts to the creditors concerned, and (ii) the fact that out of the same monies would be paid the deposit in respect of the property the respondents were buying from another person. The respondents contend that since the money could easily have been paid to them, as the deposit was, it, and any interest it earned, belonged to them.

It is submitted for the appellant that the Court should take "a robust commonsense view of the matter" and resolve this not insignificant dispute of fact in favour of the appellant. It is also submitted for him, quite rightly in my view, that the determination of this dispute resolves the matter. In other words, if the Court finds that ownership of the balance of the purchase price albeit paid to Messrs Coghlan & Welsh remained with the appellant, he would be entitled to the disputed interest. Similarly, if the Court finds that ownership of the money passed to the respondents upon its payment to Messrs Coghlan & Welsh, the disputed interest would belong to them.

The learned judge in the court *a quo* was not persuaded by the evidence of the appellant. He found that the payment of $2 500 000.00 by the appellant to the respondents was not tied in any way to the transfer of the property. He was of the view that, had that been the case, the date of such payment would not have been fixed as it was, since the date of transfer could not be pre-determined. The learned judge was also satisfied that the respondents could well have received the money themselves, and not Messrs Coghlan & Welsh, in which case they would have been able to use it as they pleased, including paying it into an interest bearing account and earning interest thereon. The learned trial judge observed as follows at p 2 of the cyclostyled judgment:

> "The arrangement was that the legal practitioners use part of the money to clear certain debts of the applicants. Again there is no mention of this being done on transfer. The money could be used to pay debts even before transfer was passed. In short, the sellers were entitled to use the money even before transfer. For those reasons it means by receiving and holding the money the legal practitioners were holding it, not for the purchaser, but for the sellers. It follows that any interest that accrued did so

> for the sellers and not the purchaser. This is supported further by the fact that the purchaser was given occupation even before transfer, free of rent."

I am in full agreement with this reasoning.

One does not need to look further than the agreement of sale, which the parties acknowledge constituted the "entire contract" between them, to ascertain what their intention was in relation to the payment of the balance of the purchase price. Clauses 6 and 9 of the agreement of sale, I find, are so clear and unambiguous in their meaning that serious doubt is cast on the appellant's version of the circumstances surrounding, and the implications of, his payment of the balance of the purchase price to Messrs Coghlan & Welsh.

To start with, the appellant's assertion that the parties had agreed the money would be paid to Messrs Coghlan & Welsh, who were to keep it in trust for him, together with any interest accruing before transfer, is not borne out by any evidence before the Court. If anything, there is substance in the assertion by the respondents that had that been the case, Messrs Coghlan & Welsh would not have indicated in their letter dated 24 November 1999, that it was the appellant (and not the other way around) who had instructed them not to pay the disputed interest to the respondents. That the respondents deny every reaching that agreement with the appellant, is further testimony of such agreement never having been reached by the parties.

The agreement of sale was entered into between, on the one hand, the appellant and, on the other, the respondents. Simply put, the appellant was the buyer,

from the respondents, of the property the latter were selling. The deposit of $500 000.00 was paid directly to the respondents. The agreement, in clause 6, provided a deadline by which the balance of the purchase price was to be paid, failing which such balance would attract interest of 41% per annum. In the absence of anything to the contrary, the inference that the balance of the purchase price was to be paid to the respondents is, in my view, so obvious that it negated the need to spell it out in the agreement of sale. The money, once paid, was to belong to the respondents. This circumstance is not altered by the fact that, rather than receive payment themselves, the respondents directed that it be paid to Messrs Coghlan & Welsh. As contended for the respondents, it was clearly in the contemplation of the parties that once the full purchase price had been paid, the respondents would have the benefit of the money, while the appellant would have the benefit of the use of the property, even before transfer had passed. Indeed the parties went on to convert this "contemplation" into action. The respondents had their debts cleared (with the appellant's full knowledge) and the deposit on the property they were buying paid, from that amount. The appellant, for his part, proceeded to occupy the property, rent free, and conduct ordinary farming business thereon. Had the intention of the parties not been that the money would belong to the respondents, the appellant would have had, pending transfer, to pay rent to the respondents.

While the appellant may have had an interest in the respondents' debts being cleared, it is difficult to see what possible interest he could have had in a situation where "his" money was to be used to pay the deposit in respect of the property that the respondents were buying. In effect, such magnanimity would have gone beyond the actual disbursements made on behalf of the respondents. Inasmuch

as such disbursements would have reduced the appellant's investment, they would, also, have reduced the interest accruing and due to him. Again, one would wonder why the appellant would be so altruistic.

The conduct of the parties, as outlined above, in my view, negates any understanding by the parties, as alleged by the appellant, that the money was to continue to be his as long as transfer had not taken place, as well as the interest accruing during that period.

The learned judge *a quo* correctly observed that the money was paid to Messrs Coghlan & Welsh with no conditions attaching to it, least of all those pertaining to transfer of the property into the name of the appellant. That being the case, the respondents are correct in their assertion that the agreement of sale between the parties was an extraordinary one. The usual agreement in the sale of immovables, as contended for the respondents, is that payment and transfer occur simultaneously. The agreement *in casu* specifically excluded this coincidence of events by providing that the appellant would take occupation, and make use, of the property rent free upon payment of the balance of the purchase price. There is merit, given this context, in the contention made for the respondents that while risk and benefit were only to pass to the appellant upon transfer, according to clause 8 of the agreement of sale, the effect of the risk and benefit clause was mitigated by the fact that the appellant was able to benefit from the crops which he would grow on the farm, in every respect as if he was the owner thereof.

The appellant seeks to distinguish between the payment made to Messrs Coghlan & Welsh and the release of the same money to the respondents, which he asserts was to be made only against transfer. Quite apart from this splitting of hairs not being specified in the agreement of sale, I find the assertion to be in conflict with the appellant's own conduct. He is, in effect, saying payment to Messrs Coghlan & Welsh, to the extent that the money did not go to the sellers of the property he was buying, was no payment at all. Yet, on the basis that by making such payment, he had paid the purchase price in full as contemplated by the agreement of sale, he proceeded to take occupation of the property, rent free, and for all intents and purposes used it as if it were his own. The appellant either paid or he did not. According to the agreement, if he did, he was entitled to take occupation of the property. If he did not, he was not so entitled. It is as simple as that. I can find nothing in the agreement of sale, or the evidence before the court *a quo*, to support the contention by the appellant that the receipt by Messrs Coghlan & Welsh was "coupled with the additional obligation owed to the appellant" not to release the amount paid to the respondents except against transfer of the property.

I am satisfied that Messrs Coghlan & Welsh were, in the circumstances of this case, acting as agents for the respondents. Their responsibility was to take payment on behalf of the respondents, make disbursements necessary to clear the respondents' debts and lift the caveats registered against the property in question, pay the deposit in respect of the other property being bought by the respondents, and transmit the balance to them. No disbursements were to be made from this money on behalf of the appellant. Indeed, as the appointed conveyancers in this transaction, the transfer fees required for registration of the property in the appellant's name would

have had to be paid to them by him. Such fees, therefore, could not have been deducted from the money paid as, and totalling, the exact amount of the balance of the purchase price of the property. In the same way that the appellant, after taking occupation of the property, was using it for all practical purposes as if it was his, the respondents used, or directed the use of, the disputed money for their own benefit.

The parties, from their conduct, evidently regarded the actual transfer of the property to the appellant as a mere formality. They did not regard it as a hindrance to the enjoyment by them of the benefits accruing from their sale and purchase, respectively, of the property in question. The agreement alleged by the appellant, that the disputed money was under these circumstances to remain his property, clearly finds no room in this arrangement for it would have meant that the appellant had free enjoyment of both the property and the interest accruing from the money that he had paid.

I am satisfied, when all is considered, that ownership of the disputed money passed to the respondents upon its payment to Messrs Coghlan & Welsh. It follows that all interest accruing on it from the date of payment rightfully belongs to the respondents.

In the light of this finding, the judgment of the court *a quo* cannot be faulted. The appeal must, therefore, fail.

I accordingly make the following order –

The appeal is dismissed with costs.

CHIDYAUSIKU CJ: I agree.

MALABA JA: I agree.

Job Sibanda & Associates, appellant's legal practitioners

Calderwood, Bryce Hendrie & Partners, respondents' legal practitioners