REPORTABLE ZLR (22)

Judgment No. SC 28/07
Civil Appeal No. 297/06

SARUDZAYI NHUNDU v (1) PHINEAS CHIVAZVE CHIOTA (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
CHEDA JA, ZIYAMBI JA & MALABA JA
HARARE, MARCH 5, 2007 & OCTOBER 1, 2007

T E Mudambanuki, for the appellant

N Madya, for the first respondent

No appearance for the second respondent

ZIYAMBI JA: At the end of the hearing we dismissed this appeal with costs. The following are our reasons for so doing.

The first respondent, to whom I shall refer as "the respondent", and the appellant concluded an agreement of sale in respect of property known as 139 Rietfontein, Rietfontein Township, Harare ("the property"). Clause 2 of the agreement provided that the purchase price for the property was Z$28 billion and Clause 11 provided that:

> "The parties acknowledge that this document constitutes the entire agreement between them and that no other terms, conditions, stipulations, warranties or representations whatsoever have been made by them or their agents other than those set out in this agreement and the parties agree that no variation of this agreement shall be binding on them unless first reduced to writing and signed by both parties."

The agreement was signed by the parties on 25 January 2006 at the offices of the Central African Building Society ("CABS"). Immediately upon signature by the parties, CABS gave instructions to its attorneys to attend to the registration of a bond which was to facilitate the registration of transfer and payment of the purchase price to the appellant.

On 30 January 2006, the appellant wrote a letter to CABS advising that she had cancelled the agreement of sale. The letter reads in relevant part:

> "I write to inform you that I have cancelled sale of my house (Known as stand No 139 Rietfontein Township) to Mr Phineas Chivazve Chiota. I have informed him in writing. Cancelled is agreement of sale dated 25 January 2006. Thus done at your Platinum Office. Attached is a copy of my letter to him."

A similar letter was written to the respondent. It read:

> "I hereby write to inform you that I have cancelled our agreement of sale of my house dated 25 January 2006. I have sent a copy of this letter to CABS. Also attached is a copy of a letter which I wrote to CABS."

The respondent was of the view that there was no basis for the cancellation since he had committed no breach of the agreement nor had any breach been cited in the letter. He therefore refused to accept the cancellation and sought redress in the High Court by way of an interim interdict restraining the appellant from disposing of the property to a third party. He obtained a provisional order granting the interim interdict sought and requiring the appellant to show cause why a final order compelling the transfer should not be issued in his favour.

The appellant opposed the confirmation of the provisional order. In her opposing affidavit, she claimed that the respondent had breached a condition precedent to

the agreement, namely, that the respondent, who was then Deputy Minister of Industry and International Trade, orally agreed to make available to her two licences: one for the buying and selling of sugar; and the other for buying and selling of petroleum. For this reason, so she averred, the purchase price was pegged at the low price of 28 billion dollars as she would be able to trade with those licences and obtain, from so doing, such profits as would offset the low price at which the house was being sold. The agreement of sale, she stated, was reluctantly signed at CABS because the respondent had not, at the time of signature thereof, honoured the verbal agreement by issuing the two licences to her. She did not give a date by which the alleged oral agreement was to be performed.

At the hearing for confirmation of the provisional order, the issues for determination by the trial court were whether the appellant had established that there was an oral agreement amounting to a condition precedent governing the written agreement signed by the parties and if so was the respondent in breach of that agreement; and, whether the cancellation by the appellant was valid. The learned Judge decided the issues in favour of the respondent and granted the final order against which the appellant now appeals to this Court.

The appellant submitted in this Court that the written contract is not a true representation of what the parties agreed and therefore evidence ought to be admitted to establish the "real and genuine agreement", which is, that the sale was subject to the oral condition precedent.

It was contended on behalf of the respondent that the entire agreement between the parties is contained in the written contract and that the parol evidence rule

prohibits the leading of extrinsic evidence to prove the existence of the alleged oral condition precedent.

The parol evidence rule was stated by WATERMEYER JA in *Union Government v Vianini Ferro-Concrete Pipes (Pvt) Ltd* 1941 AD 43 at P 47, where he said:

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence."

See also *The law of Contract in South Africa 3* ed by R H Christie at p 212.

However, the learned JUDGE OF APPEAL went on to say further at the same page:

> "Whatever may be the correct view as to the precise nature of the rules, it is clear that they do not prevent a party from setting up the case that the contract is not a presently enforceable contract inasmuch as it is conditional upon the happening of some event which has not occurred."

Thus the parol evidence rule does not preclude extrinsic evidence that the contract is conditional upon the happening of an event which has not occurred. However, if the object of leading such extrinsic evidence is not only to prove the alleged oral condition precedent but to incorporate it into the agreement of sale and then to enforce the said condition by relying on the respondent's failure to comply therewith then the extrinsic evidence would be inadmissible. See *Philmatt (Pvt) Ltd v Masselbank Development CC* 1996 (2) SA 15 (A) at p 23. See also *Johnston v Leal* 1980 (3) SA 927 (A) at 943 where CORBETT JA remarked:

> "Dealing first with the integration rule, it is clear to me that the aim and effect of this rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract. The object of the party seeking to adduce such extrinsic evidence is usually to enforce the contract as redefined or, at any rate, to rely upon the contractual force of the additional or varied terms, as established by the extrinsic evidence…".

And later on the same page:

> "To sum up, therefore, the integration rule prevents a party from altering, by the production of extrinsic evidence, the recorded terms of an integrated contract in order to rely upon the contract as altered."

The appellant herein seeks, firstly, to prove that, contrary to the provisions of clause 11 *supra*, there was a condition precedent governing the contract and, secondly, to enforce that condition so proved. In so doing, the appellant was seeking to redefine the terms of the contract. The parol evidence rule precludes her from leading extrinsic evidence with that objective. See also *Philmatt (Pvt) Ltd v Masselbank Development supra*.

In any event, even assuming for an instant that the court had been persuaded to allow parol evidence of the oral condition precedent, the evidence on record does not support the existence of such an oral agreement as the learned Judge correctly found.

It was common cause at the hearing that the appellant's friend and confidante, Biata Nyamupinga ("Biata"), was actively involved in the negotiations preceding the conclusion and signature of the agreement.

Biata averred in her supporting affidavit that no such condition precedent was ever discussed during the negotiations or at any time before the signature of the agreement by the parties. She relates the events following the offer of 28 billion dollars by the first respondent for the property as follows:

> "The applicant [the respondent] and [the appellant] shook hands and hugged each other after signing the agreement. All the dealings between the applicant [the respondent] and [the appellant] involved me as I was in essence the link between the two. At no stage during the negotiations for the sale of this property was there any discussion of the licenses that [the appellant] has referred to. This is the first time that I have heard of these licences. Such an issue never formed the basis of the agreement. The [appellant] was selling because of mounting debts. She owed me and several other people in town huge sums of money. The purchase price would have enabled her to pay off all debts and then acquire a smaller property."

Further, the respondent averred, and this was not contradicted, that neither of the two licences allegedly offered by him to the appellant fell within the mandate of his Ministry. In any event, since the alleged condition precedent had not been fulfilled there is no reason given in the papers as to why the appellant signed the agreement of sale and why, when she later cancelled the agreement, no reason was given for such cancellation.

In view of the above, we were satisfied that the judgment of the court *a quo* was unassailable and that the appeal was accordingly devoid of merit.

CHEDA JA: I agree

MALABA JA: I agree

Mudambanuki & Associates, appellant's legal practitioners

Wintertons, First respondent's legal practitioners