HH 141-03
HC 4190/2002
ELWYN MUDUNGWE in his capacity as
TONDERAI DAITON TELA'S GENERAL
ATTORNEY AND AGENT
versus
DESMOND CHARLES WOOD
and
ANNA-MARIE WOOD
and
THE REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAVANGIRA J,
HARARE, 13 March and 3 September, 2003

Mr for applicant
Mr for respondents

MAVANGIRA J: On 28 August, 2001 and at Harare, Zimbabwe, Tonderai Tela, by general power of attorney, nominated and appointed Elwyn Mudungwe to be his general attorney and agent for managing and transacting all his affairs including the commencement, prosecution or defence of any action, suit or other proceedings in or before any Court. It is in that capacity that Elwyn Mudungwe, the applicant, instituted this Court application in which an order is sought in the following terms:

> "1. That the lst and 2nd respondents be and are hereby ordered to sign the necessary transfer documents in respect of Strand 13270 Salisbury Township at Stand 6679 Salisbury Township within 10 days of service of this order upon them.
>
> 3. 2. That in the event of the lst and 2nd respondents failing to comply with paragraph l hereof the Deputy Sheriff, Harare, be and is hereby authorized to sign the necessary transfer documents on behalf of the respondents".

An order of costs is also sought against the two respondents.

From the papers emerge the following facts. In August 2001 an agreement of sale in respect of a "certain piece of land situate in the district of Salisbury measuring 1683m² called Stand 13270 Salisbury Township of Stand 6679 Salisbury Township or as fully described in deed of transfer 3942/96" was entered into between the lst and 2nd respondents as sellers and Tonderai Daiton Tela as the purchaser. Although

seller's signature is indicated as having been made on 29 August, 2001 and the purchaser's signature as having been made on 24 August, 2001,. The agreement states the date of the sale as 28 August, 2001.

Paragraph 1.1 of the agreement of sale provides:

> "The Seller hereby sells the property to the Purchaser for the price set out in the Schedule".

Paragraph 2.1 of the agreement of sale provides:

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

Paragraph 5.1 provides:

"This agreement shall be subject to the Special Conditions contained in Annexure A".

Paragraph 13 provides:

"This Agreement constitutes the entire contract between the parties and:-

13.1 no representation or undertaking has been given or made by either party to the other except as recorded in this agreement;

13.2 there are no conditions precedent suspending the operation of this agreement which are not referred to in it;

13.3 no variation in this agreement shall be valid unless in writing and signed by or on behalf of the parties".

Annexure "A" to the agreement of sale is headed "Special Conditions" and provides:

> "This agreement of sale is conditional upon:-
>
> 1. The Purchaser paying the sellers a deposit of $3 375 000,00 (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 Agents Commission of $250 000,00 (Two hundred and fifty thousand dollars) to the Agents.
> 3. The balance of the Purchaser (*sic*) price amounting to $l 500 000,00 (one million five hundred thousand dollars) shall be paid by the Purchaser within 6 months of this Agreement of Sale that is to say by 28 February, 2002.
> 4. The Agents Commission shall be paid by both parties in equal shares i.e. the Sellers %125 000,00 (One hundred and twenty five thousand dollars) and the Purchaser $1125 000,00 (One hundred

and twenty five thousand dollars).

5. The Sellers shall rent the premises at a rent to be negotiated after Transfer of Property".

On 30 August, 2001 Messrs Coghlan Welsh & Guest issued a receipt acknowledging receipt of $3 375 000,00 from Barclays Kurima House "re D C Wood/Tela". On 5 November, 2001 they issued a receipt acknowledging receipt of $1 345 000,00 from E S Mundungwe re Wood/Tela T.D. On ll December 2001 they issued a receipt acknowledging receipt of $261 312,50 from E S Mudungwe re D C Wood/T D Tela.

Annexure D to the applicant's founding affidavit in a memorandum of fees dated 7 September, 2001 by Messrs Coghlan Welsh & Guest to T D Tela. It is headed : Re: Transfer : D C Wood to T D Tela Stand 13270 Salisbury Township of Stand 6679 Salisbury Township". It then itemizes as follows:

"To our fees herein		$ 49 850,00
To sales tax	$ 7 477,50	
To paid stamp duty	$298 785,00	
To postages and petties	$ 200,00	
	$356 312,50	
To estimated rates		30 000,00
		386 312,50
		125 000,00
		$261 312,50

It is opportune at this juncture to note that the three receipts issued on 30 August, 2001, 5 November, 2001 and ll December, 2001 add up to $5 000 000,00 which is the amount cited as the purchase price in the agreement of sale. Furthermore the amount reflected in the statement of fees relating to the transfer of the property in question, referred to above was receipted on ll January, 2002 in addition to the $5 000 000,00

already referred to above.

The following facts also emerge from the papers.

On 12 October, 2001 the lst respondent wrote a letter to Westwinds Realty (Private) Limited (Westwinds) in the following terms:

> "I feel it necessary to inform you of the changed circumstances regarding the sale of the abovementioned property, especially with regard to Annexure 'A' which outlines SPECIAL CONDITIONS of the sale.
>
> The reason for selling my property was that I intended to purchase a houseboat and reside and carry out a business in Kariba, which was my sole motivation for selling.
>
> The seller of the houseboat expected a payment on 29/08/2001.
>
> I was unable to meet this stipulation due to the procrastination of the purchaser of my abovementioned property.
>
> Additionally, when the agreement of sale for the abovementioned property was discussed between us, I specifically stated to you that I expected to receive $5 000 000,00 (five million dollars) clear, after all deductions had been made. You led me to believe that I would indeed receive the said sum. Subsequent to the agreement being signed however it appears that I would not be clearing the previously mentioned amount.
>
> The purchaser did not meet special condition l, which states that the purchaser would pay me a deposit of %3 375 000,00. (Three million three hundred and seventy five thousand dollars) on signing the Agreement of Sale, (28/08/2001) which would have enable me to pay the seller of the houseboat.
>
> Consequently I have lost the houseboat and now have no reason to sell my house as I would have no place of abode and the fact that I would not receive $5 000 000,00 clear, would have inhibited the start of the intended business in Kariba.
>
> It is with the abovementioned facts I mind that I withdraw from this Agreement of Sale and withdraw my property from the market and no longer wish to sell.
>
> I shall appreciate your cancelling the Agreement of Sale in writing at your earliest convenience and will be prepared to collect the document from your offices as soon as I am advised by you telephonically to do so".

On the same date the lst respondent also wrote a letter addressed to Mr Tonderai Daiton Tela c/o Westwinds Realty (Private) Limited stating:

> "I give your (*sic*) notice of the Agreement of Sale to remedy the breach relating to payment of the deposit.
>
> If I do not receive payment at the expiration of the notice days, the Agreement of Sale will be automatically cancelled".

It is opportune to note at this juncture that the lst respondent avers that the seller of the houseboat expected payment on 29 August, 2001 which is the date on which he singed the Agreement of Sale with the applicant's principal. Furthermore, further

payments on behalf of the applicant's principal besides the payment of 30 August, 2001, were accepted on subsequent dates long after 29 August, 2001, that is, on 5 November, 2001 and ll December, 2001. Furthermore still, as at 21 May 2002 when the lst respondent swore to the opposing affidavit the applicant's principal had, in total, paid a sum of $5 261 312,50 which in fact is $ll 312,50 more than required by the provisions of Annexure "A", that is the "Special Conditions" to the agreement of sale already referred to above. Viewed from another angle, the total amount paid represents the purchase price stipulated in the agreement as the purchase price as well as the fees as detailed in Messrs Coghlan Welsh and Guest's memorandum of fees dated 7 September, 2001.

It is also significant to note that the letter to the applicant's principal was addressed not to the applicant's principal's address as given in the Agreement of Sale but to the estate agent's address.

It also emerges from the papers that on 5 December, 2001, Messrs. T K Hove and Partners, then acting for the lst respondent addressed a letter to the director of Westwinds in the following terms:

> "…We act for Des Woods in this matter. Our client instruct (*sic*) us that there has been a material breach of the said Agreement of Sale.
>
> The said breach relates to:
>
> 1) The purchase Price agreed to of $5 million (five million). We are instructed that contrary to our client getting the entire sum even after deductions as you had indicated to him before signing, the opposite is this case as he will not be getting the entire purchase price.
> 2) We are further instructed that special condition l of the agreement has also not been observed in that our client was not paid the deposit of $3 375 000,00 (three million three hundred and seventy five thousand dollars) on the signing of the Agreement.
>
> Our client feels that the said breach is so material as to go to the heart of the agreement such as would lead to termination.

In the circumstances, we are requested to inform you, as we hereby do, that the purported agreement has been cancelled. Kindly remove our client's property from being advertised or in any way dealt with".

It is significant to note that this letter was written after acceptance of the payments of 30 August, 2001 and 5 November, 2001. Furthermore subsequent to this letter further

payments were accepted on ll December, 2001 and ll January, 2002.

It is clear from the papers that on 8 February, 2002 the lst respondent wrote a letter to Coghlan Welsh and Guest indicating that as he was going to receive a nett amount of less than $5 million that would be contrary to what had been agreed with the purchaser with particular reference being made to paragraph 2.1 which stipulates that the price shall be paid "free of deductions" to the seller. He also indicated in the letter that in view of the fact that. "I specified all the deductions to the lawyer and his agent, I feel that in the present circumstances the agreement is in breach of clause 2.1". He then requested that the file be referred to Mr Edkins "for further consultation in view of the fact that I cannot sign any transfer documents until I am satisfied that the monies due to me are in accordance with clause 2.1 of the agreement to the amount of $5 000 000,00 nett".

It is important at this stage, in my view, to refer back to clause 13 of the agreement which has already been quoted above as well as Annexure "A", the special conditions. What appears to be clear is that the applicant's principal has paid not only $5 000 000 but also, in addition the additional amounts as stipulated in the agreement what appears to be also clear is that there are no other amounts or deductions stipulated anywhere else in the agreement. Furthermore, if the deductions that the lst respondent avers he specified to the buyer and his agent are not recorded in the said agreements then in terms of the very same agreement such d not form part of the agreement between the parties.

On 12 February, 2002 Messrs Coghlan Welsh and Guest wrote to the lst respondent and stated *inter alia*,

> "…the agreement of sale is quite specific.
> The reference to deduction relates to the purchase price and no other consideration.
>
> You would appear to suggest that the purchaser was agreeable to paying amounts over and above the purchase price but there is nothing in the contract o verify this and confirm having spoken to the estate agent who refutes your claim.
>
> The purchaser would not have known for example, how much was owed the building society by you, what Capital Gains Tax was due, costs of cancellation of the bond and the like.
>
> The law is quite clear and the phrase; without any deduction is confined to such deduction or abatement as might reasonably have been in the contemplation of the parties at the time when the contract was executed (see *United Mines of Rietfontein*v *De Beers Consolidated Mines Ltd*, 175C 425 and *Paynton*v *Crau*1910 AD 205).
>
> We are very much concerned that you are at risk, and frankly, if you are unable to prove that the existing written contract is not the whole contract agreed upon there will be no prospect for success in the High Court in the event the purchaser sues.
>
> We would therefore ask you to please to let us have documentary proof or evidence as to what you allege was agreed upon".

The lst respondent responded to the above letter on 14 February, 2002 requesting that Messrs Coghlan Welsh & Guest do not go ahead with the transfer and reiterating that the file be referred,

presumably from the conveyancing department, to Mr Edkins for further consultation.

On 16 March 2002 the lst respondent obtained from Borm Real Estate a letter indicating that they valued the property in question at $25 000,000 (twenty five million dollars).

On 15 April, 2002, Musunga and Associates, then the lst respondent's legal practitioners wrote to Messrs Wintertons stating -

> "Your letter dated 8th April, 2002 addressed to our clients have *(sic)* handed to us with instructions to respond.
>
> We wish to draw to your attention that the Agreement of Sale was cancelled on the 5th December, 2001. At that time our client was represented by Messrs T K Hove and Partners and we attach hereto a copy of the letter.
> Our client had previously written to Mr Lucas Magerimbo of Westwinds Realty (Pvt) Ltd advising him of the material breach in relation to the purchase price. We attach a copy of the letter.
> Our client even went further and advised the estate agents of the problems regarding this particular sale.
> We are therefore of the firm view that there was a material breach regarding the purchase price and the Agreement of Sale was cancelled…"

Although in his opposing affidavit the lst respondent raised the issue with the validity of the nomination and appointment of the applicant as his principal's general attorney and contended that he thus had no *locus standi*to represent his principals, the issue was not persisted with in the lst respondent's heads of argument nor in submissions to the court by his legal practitioner. In my view, the applicant's and his principals responses to the challenge as well as his heads of argument adequately dealt with the issue hence the abandonment of same thereafter. It is thus not necessary for the Court to dwell on the issue. The court will thus proceed to determine whether or not the applicant is otherwise entitled to the order sought.

In support of his contention that the agreement of sale was cancelled, the lst respondent relies on his letters of 12 October 2001 addressed to Westwinds and to the applicant's principal. As already stated above, the letter to the applicant's principal was addressed to 'c/o Westwinds Realty (Pvt) Ltd" and not to the applicant's principals, chosen *domicilium citandi*in terms of the agreement of sale. He also relies on the letter dated 5 December 2001 from T K Hove and Partners to the director of Westwinds. In any event both the applicant's principal and Westwinds aver that they never received the notice. In any event, the notice would not be valid anyway as the deposit had been paid on 30 August, 2001, That is, a day after the singing of the agreement by the lst respondent. The notice period of 7 days as agreed between the parties in terms of paragraph 8 of the agreement of sale is in contravention of the provisions of section 8 of the Contractual Penalties Act, Chapter 8:04, this being an instalment sale of land. The parties' agreement to a notice period of 7 days is irrelevant. In this regard see *Preston*v *Charuma Blasting and Earth Moving Services (Pvt) Ltd and Another*1999 (2) ZLR 201 (S_ at 203 to 204 A where SANDURA JA had this to say:

> "Although the parties had agreed that if the respondent fails to pay any instalment by due date it will be given 14 days within which to remedy the breach before the agreement will be terminated. The period of 14 days agreed upon is irrelevant. This is so because, in terms of section 8(2)(c) of the Act, if the period agreed upon is shorter than 30 day, the Purchaser should be given 30 days within which to remedy the breach before the agreement can be terminated. On the other hand, if the period agreed upon a longer than 30 days the Purchaser should be called upon to remedy the breach within the period agreed upon, before the agreement is terminated for breach of contract".

Furthermore, and, in any event, section ll of the Contractual Penalties Act provides:

"No waiver of any right or benefit conferred by this Act shall be of any force or effect".

In the result, the purported cancellation of the agreement of sale by the lst respondent is not in terms of the Contractual Penalties Act and thus cannot be valid.

I will now deal with the lst respondent's contention that clause 2 of the agreement, which provides that the purchase price shall be paid free of deduction to the seller in the manner set out in the schedule, was not complied with.

In the first instance, as submitted by the applicant's counsel, the words "without any deduction" have been interpreted by the South African courts. In *United Mines of Bultfontein*v *De Beer Consolidated Mines Limited,*17 SC 425 DE VILLIERS CJ said -

"It appears to me…that these words should be confined to such deduction as might reasonably have been in the contemplation of the parties at the time when the lease was executed".

See also *Paynton*v *Crau*, 1910 AD 205. In this regard paragraph 4 of the letter of 12 February 2002 from Messrs Coghlan, Welsh and Guest to the lst respondent is opposite. "The purchaser would not have known, for example, how much was owed the Building Society by you, what Capital Gains Tax was due, costs of cancellation of the bond and the like". 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, ion 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 lst respondent was his debt and the applicant's principal could not have been expected to pay it unless the Agreement of Sale specifically provided so. Clause 13 of the Agreement of Sale is of paramount importance in this regard, that is, in determining what was in the contemplation of the parties when they entered into the Agreement of Sale. In terms of clause 13, what was agreed by the parties to the agreement is recorded therein. What is not recorded therein was not agreed upon. The deductions or costs that the lst 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.

Furthermore, and in any event, the provisions stipulated in Annexure "A", the special conditions are very clear and specific and as already noted above, the applicant's principal has complied with same.

In the circumstances I find that the applicant's principal has not breached the Agreement of Sale; that the purported cancellation of the agreement by the lst respondent is invalid and that the applicant's principal is therefore entitled to the order sought. I find no reason why costs should not follow the result.

In the result it is ordered as follows -

IT IS ORDERED:

1. That the lst and 2nd respondents be and are hereby ordered to sign the necessary transfer documents in respect of Stand 13270 Salisbury Township at Stand 6679 Salisbury Township within 10 days of service of this order upon them.

2. That in the event that the lst and 2nd respondents fail to comply with paragraph l above, the Deputy Sheriff, Harare, be and is hereby authorised to sign the necessary transfer documents on behalf of the respondents.

3. That the lst and 2nd respondents bear the costs of this application jointly and severally the one paying the other to be absolved.

Winrtertons, applicant's legal practitioners
Musugna & Associates, lst respondent's legal practitioners