ANDREW CHANAKIRA
versus
MORGAN MAPUNGWANA

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE , 25 September 2003 and 10 March 2004

Mr *Tamangira,* for the applicant
Adv. *Mazonde,* for the respondent

CHITAKUNYE J: On the 25th April 2002 the applicant and the respondent concluded an agreement of sale. The subject matter was a certain piece of land situate in the district of Norton called stand No. 3904 Nharira Views, measuring 2100 square metres. The applicant was the seller and the respondent was the buyer. The purchase price was agreed at $2 600 000 (two million and six hundred thousand dollars) payable as follows:

(1) a deposit of $2 000 000 (two million dollars) payable on signing of the agreement and

(2) the balance of $600 000 (six hundred thousand dollars) to be paid on or before 30th May 2002.

Instead of paying the two million dollars, the respondent paid one million and eight hundred thousand dollars on signing the agreement.

The balance of $800 000,00 was to be paid on or before 30 May 2002. It is common cause that by 30 May 2002 the respondent had not paid that balance. According to the applicant he decided to cancel the agreement as respondent had failed to pay the balance of the purchase price despite giving him the notice to remedy the breach and an extension thereof.

The applicant thus applied to this court seeking an order that:-

"(1) The Agreement of Sale entered into by and between the Applicant and the Respondent on the 25th April 2002 be and is hereby cancelled.

(2) Applicant refunds respondent the $1.8 million being part of the purchase price paid by respondent.

(3) Respondent pays the costs of the applicant."

The respondent opposed the application. He contended that he paid the purchase price in full and that he has in fact taken transfer of the property.

From the documents filed of record and submissions made, the major issue is whether the respondent was in breach of the agreement of sale. If so was such breach such as to entitle applicant to cancel the agreement of sale. It is common cause that payments were not strictly made according to the terms of the agreement of the 25th April 2002.

Payments were made as follows:

- a deposit $1 800 000 upon signature
- $450 000 on the 10th July 2002
- $335 000 on the 25th July 2002 and
- a disputed sum of $15 000 in May 2002.

The sums of $450 000-00 and $335 000-00 were paid after 30 May 2002 and also well after 30 days from that date.

In terms of clause 4 of the agreement of sale, 'in the event of the purchaser failing to pay any installment of the purchase price or any other sum owing under the agreement on the due date thereof, or committing a breach of any of the conditions of this agreement and failing to make good such defaults or remedy such breach within thirty days of the date of the posting of a written notice to the purchaser requiring the purchaser to do so, then notwithstanding <u>any previous</u> waiver the seller … shall be entitled without further notice either –

(a) to declare the sale cancelled … or

(b) to institute proceedings against the purchaser for payment of the entire outstanding balance of the purchase price ….'.

In compliance with clause 4 on the 3rd June 2002, the applicant sent a letter to the respondent calling upon him to pay the balance within 30 days failing which he intended to cancel the agreement. Unfortunately that notice did not yield any payment. On the 12th June 2002 Paragon Real Estate wrote an Addendum to the agreement that 'further to the above Agreement the two parties agreed that the final payment of $800 000 shall be paid on or before 7th July 2002'. Both parties and a witness appended their signatures to that addendum. Again no payment was made before 7 July 2002.

On the 10th July 2002 the applicant's then legal practitioners Baera and Company wrote a letter to the respondent to the effect that despite having been given up to the 7th July 2002 to pay the balance of $800 000-00 the respondent had not done so and so the applicant was canceling the

agreement of sale. The instructive paragraph reads:

> "Client further instructs that you paid a substantial deposit towards the purchase of the property and were supposed to pay a further $800 000 by 7th July 2002. Client instructs that you have failed to do so and has therefore decided to cancel the Agreement of Sale forthwith. In the meantime client is making arrangements to refund you the deposit you have already paid towards the purchase of the property."

That letter was copied to Paragon Real Estate and to the Director of Housing and Community Service. Norton Town Council.

The respondent's contention was chiefly an attempt to explain away the failure to pay within the period stipulated in the agreement of sale. In his opposing affidavit he indicated that the applicant granted him extension within which to pay the balance and he has since paid through Paragon Real Estate. I am of the view that the respondent's contention in his opposing affidavit was misplaced. It is not so much about payment at any time, but payment within the periods stipulated. For some reasons respondent does not in his opposing affidavit state the extensions given and when he paid the balance in relations to those extensions as he claims.

The applicant's letter of the 3rd June 2002, the addendum from Paragon Real Estate dated 12 June 2002 and the letter from Baera and Company dated 10 July 2002 all serve to show that respondent did not pay within the stipulated period. The applicant's letter of the 3rd June 2002 was clearly calling upon the respondent to remedy the breach (by paying up the balance) within the 30 days as per clause 4 of the agreement of sale. Applicant was merely complying with what was required of him before he could cancel the agreement. The addendum by Paragon Real Estate of the 12th June 2002 extended the period that the agreement had gotten to, that is the notice period.

The extension tends to confirm the applicant's contention that the respondent was asking for more time to pay.

The respondent brought in another dimension to his case when he revealed in his supplementary affidavit that at one time he cancelled the agreement of sale because of a problem between the applicant and his wife. The respondent now sought to say that he did not pay within the stipulated periods because of that problem. That was not the respondent's initial contention; that he did not pay within the stipulated periods because of such a problem. His contention was that he had paid upon being granted extensions.

It is not disputed that there was that cancellation. However when the parties decided to revive the agreement it would appear that they were to take up the agreement from where they had left it. They did not seem to have changed anything in terms of terms of payment. It would appear the parties agreed to continue with the agreement as if it had never been cancelled. This may be discerned from the applicant's letter of 3 June 2002 to the respondent. The main body reads:

> "I refer to your telephone conversation of 1st June 2002 in which you confirmed your desire to proceed with the Agreement of Sale. I would however like to remind you that in terms of our agreement the full purchase price should have been paid by the 30th May 2002. I am now giving you 30 days to pay the outstanding balance failing which I intend to cancel the Agreement."

It is clear that as at the time of revival of the agreement of sale, the respondent knew that he had 30 days within which to pay the balance of the purchase price failure of which the applicant would cancel the agreement. When he signed the addendum prepared by paragon Real Estate on the 12th June 2002 respondent should surely have known that it was on the issue of deadline for payment of the balance failure of which the applicant would cancel the agreement.

Clearly therefore when the 7th July 2002 passed without the respondent having paid up he ought to have realized that the applicant no longer had any hurdle in exercising his right to cancel the agreement.

The letter by Baera and Company dated 10 July 2002 confirmed what the respondent should have expected. The letter indicates in no uncertain terms that the applicant has cancelled the agreement forthwith. The letter was addressed to the respondent and copied to Paragon Real Estate and the Director of Housing and Community, Service, Norton Town Council. I did not hear the respondent to contend that he did not receive that letter.

It is thus puzzling that inspite of such a letter spelling out the action applicant has taken the respondent went ahead to pay through Paragon Real Estate. When he made the payment especially on the 25th July 2002 the respondent knew he was paying towards an agreement that had been cancelled.

As the letter was copied to Paragon Real Estate one wonders in what capacity the Estate Agency was receiving the money. Clearly its mandate to receive money over this agreement of sale had been terminated by that letter.

The respondent's contention that the property has already been transferred to him is not true at all. There are some anomalies with the purported transfer. According to clause 5 of the agreement transfer was to be effected only after the purchase price and any other payments due had been paid. According to a letter purportedly from Norton Town Council (produced by the respondent) dated 1 August 2002 the property in question was ceded to the respondent on the 13th June 2002. This was a date well before the respondent had attempted to pay the balance of the purchase price. As already alluded to the respondent only made the full payment on the 25th July 2002 through Paragon Real Estate.

It is interesting to note that he period when transfer is said to have taken place, after the applicant had consented thereto, is in fact the time applicant had given respondent 30 days within which to pay the balance failure of which he intended to cancel the agreement.

When court asked the parties to provide a documentary confirmation of the purported transfer they failed. A letter dated 29 September 2003 from the Ministry of Local Government, Public Works and National Housing confirmed that no cession had been approved.

All in all I am of the view that the respondent breached the terms of the agreement of sale. He failed to pay the balance of the purchase price within the stipulated time. He also failed to pay within the 30 days notice period even after that period had been extended to the 7th July 2002.

The applicant was therefore entitled to cancel the agreement of sale and to tender a refund of the deposit respondent had paid.

It is thus ordered that:

1) The agreement of sale entered into by and between the applicant and the respondent on the 25th April 2002 be and is hereby cancelled.

2) Applicant refunds respondent the purchase price paid by respondent.

3) The respondent pays the costs of the application.

Mudambanuki & Associates, applicant's legal practitioners.
V Nyemba & Associates, respondent's legal practitioners.