Judgment No S.C. 6\03

Civil Appeal No 141\02

FRANCIS PAKETH v YANANAI CHIBONDA

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & MALABA JA
HARARE FEBRUARY 27, 2003

The appellant in person

W. Risiro, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for the rescission of a default judgment granted in favour of the respondent, entitling the respondent to evict the appellant from Stand No 2893 in the suburb of Warren Park 1 in Harare ("the property"). After hearing the appellant and counsel for the respondent, we dismissed the appeal with costs and indicated that the reasons for that decision would be given in due course. I now set them out.

The following facts were common cause. At the relevant time the property, which was occupied by the appellant, was owned by the appellant's brother, Thomas. In February 2000, Thomas and the respondent ("Yananai") concluded a

sale agreement in terms of which Thomas sold the property to Yananai. After the purchase price was paid, the property was transferred to Yananai.

Thereafter, when Yananai required the appellant to vacate the property the appellant refused to do so, alleging that he had spent the sum of $200 000 in the development of the property and that Thomas had undertaken not to sell the property before refunding that sum to him. As a result, Yananai filed a court application in the High Court seeking the appellant's eviction from the property.

When the appellant did not oppose the application, a default judgment was granted in favour of Yananai, on 13 September 2000, and the appellant was later evicted from the property on 6 October 2000.

Aggrieved by what had happened, the appellant filed a court application in the High Court in September 2001 seeking an order rescinding the default judgment. That application was dismissed with costs in April 2002. Dissatisfied with the outcome of the application, the appellant appealed to this Court.

In the application for the rescission of the default judgment the appellant explained his failure to oppose the application for his eviction, and the delay in filing the application for the rescission of the default judgment. In addition, he explained why he believed that he had a good defence to the application for his eviction. He gave two reasons. The first was that Thomas had undertaken not to sell the property before refunding to him the sum of $200 000, and the second was that the sale was a fraudulent scheme designed to deprive Thomas's wife of her share of the property upon divorce.

The learned judge in the court *a quo* was prepared to give the appellant the benefit of the doubt in respect of his failure to oppose the application for the eviction order, and his failure to make a timeous application for the rescission of the default judgment. However, the learned judge dismissed the application on the ground that the appellant had not made out a *prima facie* case for the rescission of the default judgment. He said the following:-

> "The critical point, it appears to me, is whether the applicant is entitled to raise the above issues as against the respondent. In her opposing affidavit, the respondent challenges the applicant's

> standing in objecting to the sale between herself and his brother when the applicant is not a joint titleholder of the property. I agree that the applicant cannot seek to enforce an agreement with his brother through the respondent. The respondent was not party to the agreement for the payment of $200 000.00 to the applicant. The applicant cannot also claim or enforce his brother's wife's rights. Thus, while the applicant may be given the benefit of the doubt pertaining to the requirement that the default must not be wilful for rescission to be considered, he clearly has not made out a *prima facie* case to warrant interference with the judgment."

I entirely agree. There was, therefore, no basis on which the appellant could oppose the respondent's application for his eviction. This was appreciated by the appellant's own lawyers at the time who, on 4 October 2000, wrote to the respondent's lawyers as follows:-

> "We have since advised our client that their private arrangement (for payment of $200 000 to the appellant) cannot be used as a legal argument to deny your client his rights to vacant possession to this property. Consequently our client has requested us to plead with yourselves and your client to relocate to the cottage as a tenant to give him sufficient time to find alternative accommodation.

We sincerely apologise to your client for the inconvenience caused."

The appellant's request for permission to move to the cottage was rejected. However, considering the contents of the letter set out above, it is surprising that the application for the rescission of the default judgment was ever made.

In the circumstances, the appeal was devoid of merit and was, therefore, dismissed with costs.

ZIYAMBI JA: I agree

MALABA JA: I agree

V.S. Nyangulu & Associates, respondent's legal practitioners