

REPORTABLE (31)

Judgment No. SC37/06

Civil Appeal No. 29/06

(1) MR MASIMBA CHANDAVEMBERWA
(2) MS T CHANDAVEMBERWA

v

(1) MR W MUTYANDA
(2) MR CHARLES MASIMBA CHIHUMBIRI
(3) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE

CHIDYAUSIKU CJ, CHEDA JA, & ZIYAMBI JA
HARARE, JUNE 19, 2006

L Mazonde, for the appellants

J A Zindi, for the respondent

No appearance for the third respondent

CHEDA JA: After hearing Mr Mazonde for the appellant we dismissed this appeal with costs and said the reasons would follow.

These are the reasons:

The second respondent was the owner of immovable property which he sold to the first respondent. The first respondent subdivided the piece of land into three stands, that is, No 43, 44 and 45. He then sold the subdivided stands as follows:

Stand No 45, measuring 4391 square metres, to a company known as

Denkamp Investments (Private) Limited, by agreement dated 29 April, 2002.

Stand No 43, measuring 5347 metres to Daniel Gozo by agreement dated 21 May 2002.

On 3 June 2002 the first respondent entered into yet another agreement of sale of a stand reflected as No 45 to the appellants.

Detailed arrangements were made regarding payment for the stand.

According to the first respondent's affidavit, the stand that he sold to the appellants should have been No 44 and not No 45 because, as the papers show, No 45 had already been sold to Denkamp Investments (Pvt) Ltd.

This was the first error concerning this sale. In addition, the agreement with the appellants gave the size of the stand as measuring 4326 square metres. This was a second error in the agreement because that was not the correct measurement for stand No 45.

After all this was done, the sale of stand No 43 to Gozo fell through and the appellants said they were interested in it as it was bigger. A verbal agreement was then entered into for the sale to them of stand No 43.

Arrangements were made for the price to be paid partly in United States Dollars and partly in Zimbabwean Dollars.

There is indication on the papers that some payment was made for this stand in United States Dollars to the legal firm of Robinson & Makonyere and later withdrawn by the appellants. This is confirmed by the affidavits of Makonyere and the first respondent.

Subsequent to this, the appellants then went to the High Court seeking an order to compel transfer of stand No 45 to themselves.

When problems were encountered, the appellants amended their draft order to say they were seeking transfer to themselves of stand No 43.

By then, stand No 44 which should have been the subject of the agreement with the appellants had been sold to Augustine Nzuma.

The difficult situation that the appellants put themselves in was that they were now seeking to enforce the original written agreement for stand No. 45, which agreement was defective, and at the same time seeking transfer of stand No. 43 for which they had withdrawn the part payment made in United States Dollars.

They were also arguing that it had never been agreed that part of the payment would be made in foreign currency, while at the same time accepting that there was only a verbal agreement about the sale of stand No 43.

The first respondent's position clear. It was that once the appellants withdrew the part payment for stand No 43 in foreign currency, he cancelled the sale, and, by then, he had sold stand No 44 to someone else as the appellants had opted for stand No 43.

It was clear that the appellants had difficulty about which agreement to enforce in view of the above confusion. The High Court accepted the explanation of the first respondent and dismissed the application.

On appeal, the appellants were even more confused as to the correct position.

They claimed that the dispute was about stand No 43 for which full payment had been made on the basis of the written agreement, yet the sale of stand No 43 was all verbal.

Even Mr *Mazonde* who appeared for the appellants was equally uncertain as to which agreement was enforceable in the circumstances.

That is why we dismissed the appeal.

CHIDYAUSIKU CJ: I agree.

ZIYAMBI JA: I agree.

Mushonga & Partners, appellant's legal practitioners

Kantor & Immerman, respondent's legal practitioners