Judgment No. HB 80/06
Case No. HC 1106/03

**MARTIN ZIGWATI**
**(Duly represented by Maxwell Zigwati)**

**versus**

**EMMANUEL MUNOWAPEI**

**And**

**DEPUTY SHERIFF, KWEKWE N O**

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 3 AUGUST 2006

*T C Masawi* for plaintiff
1st defendant in person

**NDOU J:** The plaintiff's claim is in the following terms:

"(a) An order that 1st defendant take all the necessary steps to pass transfer of the property to the plaintiff by signing all necessary papers.
b) An order that if [1st] defendant within 7 days of the court's order to take necessary steps, the 2nd defendant be authorised to take such steps on the defendant's behalf.
c) Costs of suit.

In the alternative plaintiff claims:

a) payment in the sum of $100 000 000,00 being the present value of the property."

The background facts giving rise to the dispute between the parties are the following. On 13 July 2002 at Kwekwe, the plaintiff and 1st defendant entered into an agreement of sale of stand number 40 Redcliff Township in which the 1st defendant agreed to sell and the plaintiff agreed to purchase the aforesaid property. The written agreement was attached to the pleadings in the form of Annexure 'A'.

It was an express term of the agreement that the 1st defendant would take all

reasonable steps necessary for the delivery of the property to the plaintiff upon



payment of the purchase price. The plaintiff's case is that he has complied with his antecedent and honoured all his reciprocal obligations particularly in that-

a) he paid the purchase price in full;

b) he has not breached any term of the said agreement.

The 1st defendant is now refusing to sign all papers necessary to transfer title over to the plaintiff. It is the 1st defendant's case that the plaintiff failed to make the payments towards the purchase price on the agreed date resulting in the 1st defendant losing a Torwood property he intended to purchase using the proceeds of his sale agreement with the plaintiff. He therefore states that the plaintiff is in material breach of the agreement, thus he is no longer bound by it and tenders refund of the purchase price.

I, therefore, proceed to consider the evidence adduced in order to determine the issue ventilated by the pleadings.

**Maxwell Zigwati**

He represented the plaintiff in the agreement by virtue of a power of attorney. He is also representing the plaintiff in these proceedings by power of attorney. The plaintiff is his brother. He said that the plaintiff is married to 1st defendant's sister and the parties attend the same church. He said the purchase price according to the agreement of sale was $4 000 000,00. On the date of signature, the plaintiff paid the 1st defendant $1 million. The balance was to be paid in full on 31 August 2002. The plaintiff was unable to do so on account of logistical problems as the money emanated from the United States of America. The plaintiff offered $700 000,00 in the

meantime. The 1st defendant agreed and he was accordingly paid $700 000,00. He signified this fact by signing an acknowledgment of receipt exhibit I, wherein he



wrote, "I, Emmanuel Munowapei, do hereby acknowledge receipt of $700 000,00 from Maxwell Zigwati in respect of No 5 Durham Redcliff …" Thereafter, the 1st defendant told him to pay through his wife. He made arrangements with 1st defendant's wife to meet on 5 September 2002. On this date, he paid her $2 280 000,00. She signified this fact by signing an acknowledgment of receipt for the said amount i.e. exhibit 2. Two days later i.e. 7 September 2002, he paid the balance of $20 000,00 and once more the 1st defendant's wife acknowledged receipt in the form of exhibit 3. All this time he was based in Gokwe. He came to Redcliff towards the end of October 2002 in order for the parties to effect transfer. The 1st defendant said he did not have the title deeds so nothing was done. Again in November 2002 he came back on the same mission. The 1st defendant gave him some explanation. He returned in December 2002 and again in January 2003 and the explanation was still the same i.e. the 1st defendant was waiting for the title deeds. In February 2003 he received information that the 1st defendant had received the title deeds and he approached him. This time the 1st defendant shifted goal posts. He suggested that the purchase price be converted into a soft loan repayable over a period of time. The 1st defendant made him another offer that the plaintiff becomes a partner in his recently formed company involved in dealing in cement. This offer was once more declined. The 1st defendant suggested that plaintiff pays $8 million over and above the $4 million already paid. It was only in May 2003 that the 1st defendant for the first time raised the issue of late payment of the balance on the purchase price due on 31 August

2002. He said he wanted to buy another property in Torwood but failed to do so on account of the said delay. He said he challenged the 1st defendant to produce proof of this Torwood sale but he failed to do so. The 1st defendant was given seven months



stay in the property in order to seek alternative accommodation. The witness was cross-examined at some length on the delay in paying the outstanding balance, and the authority of 1st defendant's wife to represent him. He said, under cross-examination, that to show that the 1st defendant agreed to the extension of the date of payment of the balance, he did not return the purchase price for seven months. He only tendered repayment after seven months. He refuted the 1st defendant's allegation that he tried to return the purchase price in January 2003. He said in fact, as far as he is aware the 1st defendant does not even have the money to repay the plaintiff. I hold the view that this witness gave his testimony very well. His evidence is satisfactory in all material respects. He did not seek to exaggerate his testimony. The 1st defendant, Emmanuel Munowapei testified in support of his case. He said he decided to sell the house in order to get a smaller one. He approached Masango who was offering his house for $2 million. For his property, he had had prospective buyers offering between $7 and $8 million. But the plaintiff approached him as a relative he eventually agreed to sell him the house for $4 million. They agreed that plaintiff pays $1million on signature and the balance not later than 31 August 2002. The plaintiff failed to raise the balance of $3 million as promised. Because he wanted to show 1st respondent that he valued their relationship (not contractual relationship) he accepted the payment of $700 000,00. He told the 1st defendant that if the balance was found it should be handed over to his wife. When he returned in October 2002 he found the rest of the

purchase price with his wife after the person from whom he wanted to purchase the Torwood house refused to sell because of the delay.

Under cross-examination he was adamant that the mandate he gave to his wife was only to receive the balance of the purchase price and not more. I should



highlighted that in his pleadings (drawn up by a legal practitioner) the 1st defendant never raised issue that his wife had no authority.

Further, he could not say why he did not buy another property bearing in mind that the plaintiff delayed by just four days or so. The money was there in his custody so he did not suffer any prejudice as at the time he could buy other properties in the market. He conceded that a day before coming to court he approached the 1st defendant with a view of settling. He also produced an affidavit by Augustine Masango. I will deal with the information deposed to by Masango later. I propose to deal with the credibility of the 1st defendant first. In my view, the 1st defendant did not perform well as a witness. He was exposed as a liar under cross-examination. The credible evidence shows that, after the purchase price was paid to him in full, he continuously gave the impression that he would effect the transfer once he had received his title deeds. Upon receipt thereof he shifted goal posts and demanded more money.

From the foregoing evidence it is clear that the plaintiff breached the contract by delaying payment by about four days. In this regard it was submitted that, by accepting the late payment, the 1st defendant waived his right to complain that the payment was delayed by four days. It is trite that there is no magic formula attached to the defence of waiver. It is entirely a question of fact to be decided upon a

consideration of all the circumstances of the particular case – *Matimba* v *Salisbury Municipality* 1965(3) SA 513 (SR AD) at p 515E-F; *The Mud-Man Empire (Pvt) Ltd* v *H Nechironga and Ors* HH-128-03 at p 6 and *Buitendag* v *Buys* AD 24-73. In this case the 1st defendant received the delayed payments and thereafter undertook to



effect transfer of the property. He only changed his mind some seven or so months later and demanded more money. The delay of seven months was caused by his bid to obtain title deeds to effect change into the plaintiff's name. On this finding alone I hold that plaintiff's case should succeed.

However, there are other grounds as well. Further, the breach here i.e. the four day delay of paying the balance, is not so serious that it is essential to the continuation of the contractual tie. As pointed out in *Bhoprops Ltd* v *Levy & Anor* G-B-9-75 at p 12 of the cyclostyled judgment:-

> "The law on this matter seems settled to be clearly settled. A purchaser's remedy depends upon the seriousness of the defect and the purchaser will not be entitled to rescission unless the breach goes to the whole root of the contract."

This, with respect, applies equally to rescission at the behest of the seller as is the case here. I say so because of what WATERMEYER CJ said in *Aucamp* v *Morton* 1949 (3) SA 611 (AD) at 619. The learned Chief Justice stated:

> "… a breach by one party of the obligations resting on him will only give the other a right to treat the contract as discharged if the breach is one which evinces an intention on the part of the defaulter no longer to be bound by the terms of the contract for the future, or if the defaulter has broken a promise, the fulfilment of which is essential to the continuation of the contractual tie."

This is not the case here. The defaulter, i.e. the plaintiff exhibited intentions to

continue with the contract by making payments of the balance of the purchase price within a short period of time. The reasons for the delay were communicated to the 1st defendant. 1st defendant thereafter accepted the payment and has not returned the same to date. This conduct is consistent with the parties agreeing to continue with the contract.



Further, the right to resile from an agreement does not arise merely by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously. In addition the defaulting party must be given a valid notice of rescission i.e. he is placed *in mora*. It is also an essential requirement that the *mora* must relate to a vital or important terms of the agreement. Put differently, a notice of rescission is of no legal consequence unless it relates to the failure to perform a vital or important term of the contract timeously – *Oatorian Properties (Pty) Ltd* v *Maroun* 1973 (3) SA 779 (A). In this case, the 1st defendant did not give a notice of rescission. Not only was he required to give a notice of rescission, but in order to constitute an acceptable notice of rescission, the language used in the notice must clearly and unequivocally convey an intention to cancel the contract – *Asharia* v *Palet & Ors* 1991 (2) ZLR 276 (SC). There was no such notice *in casu*. In fact, the 1st defendant only formally raised the issue of cancellation in response to these proceedings.

Another issue is that we are dealing here with an instalment sale of land i.e. the payment of the purchase price was made "by way of a deposit and two or more instalments". Here payment was by way of a deposit and two instalments. If my understanding of the facts is correct, then written notice to the defaulter was required

in terms of section 8 of the Contractual Penalties Act [Chapter 8:04]. As alluded to above, no written notice of whatever kind was given to the plaintiff. The affidavit of Masango, *supra*, does not take the 1st defendant's case further. It has no dates when he agreed with 1st defendant's wife. Its relevance to these proceedings is not based on any foundation. The plaintiff has performed in terms of the contract as he has done all that he was obliged to do under obligation. He is entitled to an order for specific



performance – *Farmers Co-op Society* v *Berry* 1912 AD at 350 and *Ncube* v *Mpofu & Ors* HB-69-06. I have a discretion to order specific performance which I must, however, exercise judicially. Each case must be judged in the light of its own circumstances. In this case damages are out of question. The 1st defendant does not have resources to pay back the purchase price. I take judicial notice of the fact that the prices of similar properties have substantially gone up. From the evidence it is clear that the 1st defendant is a man of very limited means. The 1st defendant cannot afford a similar property. The 1st defendant has had the full purchase price for the property from November 2002 to date. On the one hand it would operate unreasonably hard on the plaintiff if a decree of specific performance is not granted. On the other hand the decree would not produce inequitable hardships on the part of the 1st defendant. Specific performance, *in casu* does not entail rendering of a service of a personal nature.

It would not be difficult for the court to enforce the agreement as *merx* forming the subject matter of the agreement is in the hands of 1st respondent – see *Haynes* v *King William's Town Municipality* 1951 (1) SA 371 AD at 378; *Wheeldon* v *Moldenhaver*, 1910 EDL 97; *Mohr* v *Kriek* 1953 (3) SA 600 SR*; R* v *Milne and*

*Ertleigh* (7) 1951 (1) SA 791 AD and *Crispette and Candy Co Ltd* v *Michaelis N O & Anor* 1947 (4) SA 521 (AD). A specific performance decree would not produce injustice. There are no good and sufficient grounds for refusing the decree.



Accordingly, it is ordered that:

a) the 1st defendant be and is hereby ordered to take all the necessary steps to transfer right, title and interest in property known as number 40 Redcliff Township to the plaintiff within seven (7) days of the order.

(b) Failing compliance with (a) above, the Deputy Sheriff, Kwekwe be and is hereby authorised to sign the relevant papers for the effecting of transfer to the plaintiff.

(c) The 1st defendant pays costs of suit.

*Masawi & Partners c/o Makonese & Partners,* plaintiff's legal practitioners