LIZZIE MANDEYA

Versus

FELISTANO KHUMALO

And

BULAWAYO CITY COUNCIL

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 27 JULY & 13 SEPTEMBER 2007

B Ndove for the applicant
N Mazibuko for the 1st respondent

Opposed Application

NDOU J: This is a matter in which applicant sought performance of an agreement of sale. It is common cause that 1st respondent is a lessee-to-buy of stand number 71072 Lobengula West, the property which was sold to the applicant for the sum of $75 million. The purchase price was payable as follows:

a) deposit of $10 000 000,00 upon signing of the agreement;

b) $40 000 000,00 to be paid by 3 May 2004; and

(c) the balance of $25 000 000,00 to be paid over a period of six (6) months.

The 1st respondent sought to cancel the said agreement of sale on the basis of alleged breach. The applicant did not accept the purported cancellation and instead tendered full payment which was rejected by the 1st respondent. The 2nd respondent is the statutory authority which owns the property in question which is why 1st

respondent had to obtain its consent to cede his rights, title and interest in the property to the applicant.

It is common cause that the applicant breached the contract. She, in a nutshell, failed to pay the full deposit of $50 000 000,00, and failed to complete her payment of the full purchase price within the agreed period of six months. This breach is admitted by the applicant herself in her affidavit, although she seeks to explain it, by saying that it occurred due to unforeseen financial constrains. The fact remains that there was a breach of the agreement by the applicant. Effectively, therefore, the applicant is seeking specific performance of a contract that she has breached.

In terms of Clause 10.1 of the agreement, 1st respondent was obliged to give fourteen (14) days' notice to the applicant, calling upon her to remedy the breach, failing which the contract would be cancelled. It is beyond dispute about the receipt of the written notice by the applicant. It is common cause that notice was indeed received by the applicant. It is equally common cause that the applicant did not, within the notice period, remedy the breach. The contract was then formally cancelled at the behest of the 1st respondent, i.e. the innocent party.

After receiving the applicant's notice calling her to settle her balance within fourteen days, as alluded to above, the applicant went to the estate agents and paid $3 000 000,00 with an offer to pay further sums of $3 000 000,00 per month. 1st respondent rejected this offer and proceeded to cancel the agreement pursuant to the provisions of the agreement. The applicant had paid a considerable amount towards the purchase price which translates to about 69% of the value of the property. There are two issues here for determinations.

First, whether the agreement between the parties was governed by section 8 of the Contractual Penalties Act [Chapter 8:04] [hereinafter called "the Act"]. Put in another way, whether the agreement falls within the ambit of the definition of "an instalment sale of land" in section 2 of the Act.

Second, whether the 1st respondent is entitled to retain the sum paid by the applicant as penalty.

Basically, the applicant has sought to argue that while she was in total breach of the agreement, she is entitled to specific performance because the notice and cancellation were not in terms of the Act. The Contractual Penalties Act has been the applicant's major weapon of offence and defence. The respondent has not filed notice of opposition but indicated that it will abide by the decision of the court.

It is common cause that 2nd respondent had given its consent to the 1st respondent to cede her right, title and interest in the property in question. Section 2 of the Act, supra, provides the following definitions:

"Land" includes;

a) any improvements on the land, and,
b) an undivided share in land which is coupled with an exclusive right of occupation …"

"Instalment sale of land" means a contract for the sale of land whereby payment is required to be made:-

a) in three or more instalments; or
b) by way of a deposit and two or more instalments."

If I find that the subject matter of the sale was land, section 8 of the Act would apply as the payment required, *in casu*, was a deposit and more than two instalments. Further, in such instalment sale of land the 1st respondent is not entitled to enforce any penalty clause by virtue of the provisions of section 8(1)(a) of the Act.

So in this case the crucial issue for determination is whether the *merx* in the sale was land, i.e. in the ordinary sense or as defined in the Act itself.

The heading of agreement of sale is as follows:

"MEMORANDUM OF AGREEMENT OF SALE OF IMMOVABLE PROPERTY" (emphasis added)

The parties themselves understood the property being sold to be immovable. In paragraph 1 of the agreement of sale the parties were explicit on the movable property in question in the following terms:

> "The Seller hereby sells to the Purchasers [sic] who hereby purchase from the seller:
>
> Certain piece of land, situate in the District of Bulawayo being 71072 Lobengula West comprising of 4 bedrooms, separate toilet and bath tub and geyser, separate lounge and dining, ceramic tiles, painted in & out, walled & gated, yard paved, razor wire, corner stand, hereinafter referred to as "The Property" …" (emphasis added)

In my view the parties had in mind sale of land as contemplated in section 2 of the Act. It is for this reason that they used the term "land" and "immovable property" in their agreement. In fact, the words after Lobengula West comprising …" *(supra)* describe improvements on stand 71072 Lobengula West. As highlighted above, land

includes improvements. In the circumstances, the Contractual Penalties Act applies in this case. Section 8(1) of the Act requires that a seller should give written notice to a purchaser to remedy any breach before cancellation. Section 8(2) of the same Act reads as follows:

"Notice for the purposes of subsection (1) shall –

a) be given in writing to the purchaser; and
b) advise the purchaser of the breach concerned; and

c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period in the notice, which period shall not be less than –
   (i) the period fixed for the purpose in the instalment sale of land concerned; or
   (ii) thirty days;
   whichever is longer period."

It is common cause that the notice given by the 1st respondent fell foul of section 8(2) (c)(ii) i.e. the period was not thirty days as required by Act – *Fichani & Anor* v *Makonye* SC 3-2003 and *Preston* v *Charuma, Blasting & Earth Moving Services P/L & Anor* SC 135-99. The 1st respondent would have been entitled to terminate the agreement of sale only if the applicant failed to pay the balance within the period of thirty days.

The failure to comply with this specific requirement of the Act is fatal – see page 7 of cyclostyled judgment in the *Fichani* case, *supra.* This right of the applicant (as the purchaser) cannot be waived. Section 11 of Act provides:

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

On the basis of this section, the purchaser's right to be given notice cannot be waived – *Fichani & Anor* v *Makonye, supra*. Bearing in mind the breach attributable to applicant I do not think that costs on a higher scale are justified.

On the question of specific performance sought by the applicant there is a problem because there is no full performance by the applicant. As alluded to above, the applicant tendered $3 000 000,00 and sought to novate the agreement on the

question of the terms of the payment of the outstanding balance. I am not in a position, from the papers before me, to find that applicant will be able to pay the outstanding balance even if the 1st respondent was to give her proper notice in terms

of section 8 of the Act. The general rule on specific performance was stated by INNES JA in *Farmers Co-op Society* v *Berry* 1912 AD 343 at 350 as follows:

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract." See also *Benson* v *SA Mutual Life Assurance Society* 1986 (1) SA 776 (A); *Haynes* v *King Williamstown Municipality* 1951(2) SA 371 (A); *Mohr* v *Kriek* 1953 (3) SA 600 (SR); *Ncube* v *Mpofu & Ors* HB-69-06 and *Dube* v *Bopse Land Developers (Pvt) Ltd & Ors* HB-135-06.

In the circumstances I decline to exercise my discretion and order specific performance. I will declare the purported cancellation and the parties will thereafter act in terms of the agreement and the Act in asserting their respective rights.

Accordingly, it is ordered that:

1. The purported cancellation of the agreement of sale between the applicant and the 1st respondent be and is hereby declared null and *void ab initio.*
2. The 1st respondent should pay costs of this application on an ordinary scale.

Marondedze, Nyathi & Partners, applicant's legal practitioners
Calderwood, Bryce Hendrie & Partners, 1st respondent's legal practitioners