HC 12372/99

THE MUD-MAN EMPIRE (PRIVATE) LIMITED t/a BLUE CHIP AGENCIES
versus
H. NECHIRONGA
and
E. PATSANZA
and
J. LAGUDA
and
S. LAGUDA

HIGH COURT OF ZIMBABWE
NDOU J
HARARE, 15 November 2001, 16 January 2002 and 27 August 2003

Mr. *P.C. Paul,* for the applicant
Mr *J.R Tsivama,* for the respondent

NDOU J: In this application the applicant seeks an order in the following terms:

> "IT IS ORDERED THAT
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> The cancellation of the Agreement of Sale between Applicant and First and second Respondent in respect of Stand 321 Clee Drive Prospect be invalid and the Respondent be directed to effect transfer of this property to Applicant against payment of the balance of the purchase price, plus costs of transfer."

Most of the facts in this matter are common cause or to some extent beyond dispute. It is not in dispute that on 26 November 1998 the applicant company, through its managing director, Mr Walter Tongwe Mudzingwa-Manamike entered into an agreement with first and second respondents in terms of which the applicant purchased from first and second respondents, stand 321 of Prospect for the sum of $500 000. It was contemplated that the applicant would pay $90 000 from its own funds and the balance would be raised from a bank. For this reason the agreement of sale was reflected in two separate documents i.e. one for $410 000 and another for $90 000. The former document was filed with this application but the latter document is missing. It is clear that the first and second respondents are, in fact, not the owners of the property and the owners are third and fourth respondents as shown in the Deed of

Transfer filed of record. It is common cause, however, that all four respondents are related to each other and that the third and fourth respondents had given the first and second authority to sell the said property on their behalf and possible to keep to themselves the proceeds thereof. It is common cause that, although the agreements provide for cash payment of $90 000 and $410 000 on signature of the two documents only $90 000 was paid. The applicant indicated to the first and second respondents that the $410 000 would be financed through a bank loan. The first and second respondents, were however, paid $80 000,00 and this sum was paid by the applicant, *in casu,* and accepted by them on 31 December 1998. The applicant, thereafter, secured a purchaser for the property, one Mrs Dimbi. The first and second respondents were not satisfied with this development. They were of the view that the applicant acted fraudulently by making arrangements to sell the property to Mrs Dimbi. They allege that the applicant had no right to sell the property to Mrs Dimbi for $650 000 shortly after they "sold" the property to applicant before the latter had paid the full purchase price or obtained transfer of the rights, title and interest in the property. They accused the applicant of having acted *mala fide,* lacking transparency and taking advantage of their trust. The applicant submits that there is no legal bar to a person who has purchased property from re-selling it even before transfer is effected, since it is not a requirement of our law that a seller be the owner of property at the time of a sale. It is not necessary for me to decide on the correctness of this submission in this application. On 27 April 1999 the first and second respondents purported to cancel the agreement and addressed a letter to the applicant in the following terms:-

> "Re – AGREEMENT OF SALE FOR STAND NO. 321 CLEE DRIVE, PROSPECT, WATERFALLS, HARARE

We refer to the above agreement entered between Mr Mudzingwa and the undersigned on 26th November, 1998 and payment document dated 27th November 1998 signed by both parties.

In view of breach of conditions of sale laid down we hereby cancel the agreement in terms of paragraph 8 of the Agreement of Sale of this

stand."

The letter was signed by both first and second respondents. Paragraph 8 of the Agreement of Sale reads –

> "In the event the purchaser defaulting in any payment or committing a breach of any of the other terms or condition hereof and failing to remedy such breach within a period of fourteen (14) das after receipt of written notice requiring him to do so, the seller shall either have the right to cancel this agreement and resume occupation of the property, together with any improvements made thereto, and all payments made by the Purchaser be forfeited *op rouwkoop,* without prejudice to any claim for damages which the seller the seller may have arising out of such breach or otherwise, or alternatively, the seller shall, at his option, have the right to sue the Purchaser for the balance of the purchase price against tender of registration of transfer."

One of the breaches relied upon by the respondents is that the applicant effected a cheque payment of $210 000,00 and on two instances the cheque was referred to the drawer. The question is whether this amounts to a breach of the agreement. The first and second respondents also contended that the applicant misrepresented to them that he had already secured a loan for $410 000,00 from the bank and that is why the agreement made reference to a "cash sale". In this regard clause 2 of the Special Conditions reads –

> "This sale is conditional upon the Purchaser being able to raise a loan secured buy a First Mortgage Bond from a Building Society on the property …."

The applicant apparently decided on its own, without informing the first and second respondents, to raise the purchase price through a method other than the one agreed upon. The applicant decided to sell the property to Mrs Dimbi for cash, receive the said cash and pay the balance of the purchase price to the respondents. The issue here is whether the applicant was entitled to do so in light of the express provisions of clause 2 (*supra*). The purported sale to Mrs Dimbi took place in November 1998. The dilemma the applicant faced was occasioned by Mrs Dimbi's prudency. She was not prepared to pay the purchase price directly to applicant but instead chose to pay the purchase price into her legal

practitioner's trust account. The applicant exhibited some financially guts or folly and decided to pay the first and second respondents from its own sources without access to moneys from Mrs Dimbi or a bank loan. Two attempts were made in this regard and on both instances the applicant's cheques were not honoured by its bankers on account of lack of funds. It was only after these valiant attempts at effecting payments that the respondents purported to cancel the agreement. The issue for determining is whether the applicant is in breach of the agreement between the parties. The applicant failed to raise the balance of the purchase price as per agreement. Instead applicant "sold" the property subject matter of the agreement to a third party. All this was contrary to the express provisions in the agreement. Applicant made two attempts at paying the balance outstanding on the purchase price by cheque. As alluded to above, the cheques were dishonoured. The respondents' case is that all this constituted a breach entitling them to rescind the agreement. It seems clear that the applicant was in default and the respondents elected to cancel the agreement on that account. The respondents informed the applicant of their election.

> In paragraph 6 of the founding affidavit the applicant stated –
> "Although the agreements provided for cash deposits of $90 000 and $410 000 only the deposit of $90 000 was in fact paid on signature of the agreements. I informed 1st and 2nd Respondents that the $410 000 would be paid from monies to be borrowed by us from the Bank" (emphasis added)

The arrangements between the applicant and Mrs Dimbi were made contrary to the express provisions of the Special Conditions in the agreement. According to the respondents the applicant was supposed to have paid the balance of the purchase price by the first of December 1998. It is common cause that the applicant did not do so. The basis of this contention is a document signed by two of the applicant's representatives and the first and second respondents on 27 November 1998 i.e. a day after the agreement of sale *in casu* had been signed by the parties. The document provides –

> "Mrs B. Patsanza Mrs H. Nechironga

I.D. No. 63-361063 V 8 I.D. No. 63-050430 A 42
Sellers of Stand Number 321 Prospect : 3½ Acre

Agreed Price $500 000

Amount Received $ 90 000
Balance $410 000-00 to be paid by the first week of December 1998" (bolded) (Signed by sellers and buyers).

What is discernible from the papers filed by the parties is that the applicant is obliged –

(a) to pay the balance of the purchase price of $410 000 by the first week of December 1998, and

(b) in compliance with clause 2 of the Special Conditions of the Agreement, to raise a loan secured by a first mortgage bond from a building society.

It is common cause that the applicant attempted to meet the obligation in (a) by making a cash payment of $80 000 and a cheque of $210 000 by 31 December 1998. The latter payment was not to be as the cheque was, dishonoured by the applicant's bankers. The applicant's papers make no mention of the $210 000 cheque at all. Bearing in mind that it was dishonoured I am sure whether this was not by accident but by design. So some three weeks after the due date for the payment of the balance of the purchase price of $410 000 the applicant attempted to pay $290 000 but only succeeded with payment of $980 000 on account of the circumstances that I have just outlined above. Another cheque payment was made on 14 January 1999 also with disastrous consequences as it too was dishonoured.

It is further beyond dispute that the applicant never approached a building society to raise a loan secured by a first mortgage. In fact clause 2 of the Special Conditions further required of the applicant "…. To apply immediately for such loan to at least two (2) registered building societies and shall accept same timeously upon the terms offered". None of this was done. Instead, contrary to these express conditions, the applicant embarked on an arrangement of selling the said property, i.e. even before it was transferred to it, to a third party in order to raise the balance of the purchase price. This is a variation of the agreement. Any such variation has to be made pursuant to the provisions of clause 10. The cumulative effect of the applicant's conduct is that it has breached the agreement. The applicant however, contends that by accepting the payment of $80 000 on 31 December 1998 the respondents waived their right to

> complain that payment of the full purchase price was not paid on signature. In this regard, I stress what was said in *Matimba v Salisbury Municipality* 1965 (3) SA 513 (SR AD) at p 515E-F 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. The applicant, in this case, has to establish on a balance of probabilities that the respondents did an unequivocal act which is consistent only with the applicant's right to continue to pay outside the express terms of the agreement – *Buitendag v Buys* AD 24-73.
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> In my view, the facts placed before me clearly establish a breach of the agreement by applicant. The next issue is whether the respondents are thereby entitled to rescission of the agreement. Rescission does not automatically follow upon the establishment of a breach of the agreement. As was stated in *Bhoprops Ltd v Levy & Anor* G-B 9-75 at page 12 of the cyclostyled judgment –
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> "The law on this matter seems settled to be clearly settled. A purchaser's remedy depends upon the seriousness of the defect, and the purchase will not be entitled to rescission unless the breach goes to the whole root of the contract."

Also Willie and Millin's *Mercantile Law* 15 ed, page 169 and Mackeuten, *Sale of Goods in South Africa,* I4 ed, page 392. Rescission is available only where the breach complained of is such as to make the article useless for the purpose for which it is bought, or at any rate so serious that the buyer, had he known of it at the time of sale, would not have bought. In *Aucamp v Morton* 1949 (3) SA 611 Ad at 619 WATERMEYER CJ, said –

> "…. 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 on 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."

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 and has received a valid notice of rescission. In addition an essential requirement is that, the *mora* must relate to a vital or important term of the agreement. In other words, a notice of rescission is of no legal consequence unless it relates to the failure to perform a vital or important term of a contract timeously –

Sweet v Ragerguhara 1978 (1) SA 131 (D) and *Oatorian Properties (Pty) Ltd v Maroun* 1973 (3) SA 779 (A). Whether in a particular case the breach is of such a material or substantial nature is a question which can only be satisfactorily decided after an examination of all the relevant facts. Although materiality is an issue, like any other, which may be capable of determination on the averment in affidavits, from the nature of the enquiry *viva voce* evidence will in most cases be necessary for its proper adjudication – *Sweet v Ragerguhara (supra).* As already pointed out above the applicant has already made two cash payments towards the purchase price i.e. for $90 000 and $80 000 respectively leaving a balance of $330 000. In the circumstances, the agreement is partly executed and partly still executory. The innocent parties i.e. the respondents, have, in the first instance, one of two remedies, *viz,* to elect either to rescind the agreement and claim restitution and damages, or to abide by the contract and insist upon it being carried out and claim damages. In regard to these two remedies it is essential to remember that where two parties have entered into an agreement they are bound by the reciprocal obligations flowing from such agreement and neither of them can by unilateral act withdraw from or vary any of the obligations arising out of the agreement. The fact that one informs the other that he cancels the contract or that he does not intend to carry out its obligations under the agreement; or the fact that one of them commits a material breach of the contract does not by itself put an end to the agreement. The agreement only comes to an end where the innocent party accepts the cancellation or informs the other party that he regards the material breach as a repudiation of the agreement and cancels the agreement. In the latter case it is necessary for the innocent party to follow up his recording of the breach by a statement of cancellation, because it is only if he elects to cancel (i.e. accepts repudiation) that the contract is rescinded – *Radiotronics (Pty) Ltd v Scott, Lindberg & Co Ltd* 1951 (1) SA 312 (C); *Geldenhugs and Neethling v Beuthin* 1918 AD 426 and *Magnet Motor Co v Bernstein* 1929 TPD 431.

Because the respondents elected to rescind the contract the

obligation is placed upon them to make restitution of that which they have received under the agreement and their ability and preparedness to do this is a prerequisite to their right to rescind.

> On the question of the need to adduce *viva voce* evidence as outlined in *Sweet v Ragerguhara (supra)* the parties' legal practitioners urged me to adopt a robust approach and determine the issues on the papers filed of record thus dispensing with the need to refer the matter to trial.
> The critical question to be determined is whether from the facts before me, the applicant was effectively in *mora* thereby enabling the respondents to resile from the contract. I have already alluded to the notice of rescission given by the respondents to the applicant. It is trite that in order to constitute a notice of rescission, the language must clearly and unequivocally convey an intention to cancel the contract – *Asharia v Patel & Ors* 1991 (2) ZLR 276 (SC). The language used by the respondents clearly and unequivocally conveyed an intention to cancel the agreement and that is the context in which it was understood by the applicant resulting in the launch of these proceedings. The notice of rescission was not preceded by a demand (*interpellatio)*. In my view such *interpellatio* was not necessary to place the applicant in *mora.* We are dealing here with *mora ex re* as the agreement fixes the time for performance i.e. the first week of December 1998. This fixed time makes the demand that would otherwise have to be made by the respondents – *dies interpellat pro homine – Laws v Rutherfurd* 1924 AD 261. In this case INNES CJ at 262 said –"… principle which applies when a debtor undertakes to discharge an obligation on a special date; the creditor need make no demand: *dies interpellat pro homine,* and the debtor is in *mora* if he fails to pay on the appointed date." – *Cohen v Haywood* 1948 (3) SA 365 (A); *Legogote Development Co (Pty) Ltd v Delta Trust and Finance Co* 1970 (1) SA 584 (T) and *Laurie v Wright* 1940 SR 62. The applicant failed to pay the balance of the purchase on the stipulated date. Applicant tries to perform in a wrong manner by not seeking a loan from a building society "immediately" after the signing of agreement. Applicant instead tried to sell the said property at a higher price in order to raise the balance of the purchase price. The cumulative effect of these factors satisfies me that the applicant's liability to comply with the agreement was due to its own fault. Contextually, the effect constitutes a breach going to the root of the agreement. The importance of the breach in *casu* was of such significance that, without more, justified cancellation of the contract by the respondents – *Strachan v Prinsloo* 1925 TPD 709. The terms of the contract are clear and the above principle must be applied no matter how hard the result may be on the applicant. In any event I have no dispensing power to extend the stipulated date of first week of December 1998 – *Chomse v Lotz* 1953 (3) SA 738 (C).

I accordingly, dismiss the application with costs against payment by the respondents of the amounts already paid by the applicant.

Wintertons, applicant's legal practitioners.

Sawyer & Mkushi, respondents' legal practitioners.