HC 7737/2001

CHAMPION CONSTRUCTORS (PVT) LTD
versus
GOODHOPE MINES & INTERPRISES
and
RUTIMA LAND DEVELOPERS (PVT) LTD
T/a SHELTER ZIMBABWE

HIGH COURT OF ZIMBABWE
GARWE JP
HARARE, 9, 10 and 12 September 2002 and 7 May 2003

Civil Trial

Mr *E Matinenga*, for the plaintiff
Mrs *J Wood*, for the first defendant

GARWE JP: In this action the plaintiff seeks, against tender of payment of the amount due in terms of the contract, an order of specific performance against the first defendant alternatively damages arising out of what the plaintiff says was a breach of contract. At the commencement of the trial the plaintiff withdrew its claim against the second defendant and by consent it was agreed there would be no order as to costs.

The facts of this case which are common cause are as follows. Between 7-9 February 2001 the plaintiff, represented by a Ms *Elizabeth* Chidavaenzi, its director, entered into a contract of sale with the first defendant represented by a Mr Chokwenda in terms which the plaintiff agreed to buy, and the defendant to sell, certain undeveloped piece of land called Stand 158 Prospect, Harare. In terms of the general provisions of the contract the agreed purchase price was the sum of $3 million payable as follows:-

a) a sum of Z$1,5 million payable within 30 days of signing of the agreement.
b) The remaining sum of Z$1,5 million payable within twelve months from the date of agreement.
c) In the event that the purchaser failed to pay the balance of

$1,5 million within twelve months, interest would be payable on the sum from the date of such default.

The contract however also incorporated special conditions which, it was agreed, would supercede the general conditions of the contract. In terms of the special conditions the parties further agreed that:-

a) the purchaser was to provide a cash payment with a bank guarantee within sixty (60) days of the signing of the agreement.
b) The sale agreement would be binding on both parties pending Council approval of the subdivision of the stand in question. The first payment was "expected" before the end of May 2001.

What happened thereafter was as follows. On 24 May 2001 the first defendant addressed a letter to the plaintiff advising that a breach had been committed as no payment had been received as agreed. Shortly thereafter on 31 May 2001, the first defendant entered into another agreement with the second defendant in terms of which the second defendant was *inter alia* to pay a sum of $2,3 million to the first defendant on the signing of the agreement.

On 11 July 2001 the plaintiff filed an urgent application to interdict the first defendant from selling, alienating or transferring its rights to any other person pending the determination of an action that was to be instituted within a fortnight. On 13 July 2001, the first defendant's legal practitioners addressed a letter to the plaintiff drawing attention to the letter written by first defendant on 24 May 2001 and advising of the cancellation of the agreement of sale. By letter dated 17 July 2001 the plaintiff's legal practitioners advised the defendant's legal practitioners that the letter of 24 May 2001 was not valid given that it did not comply with clause 8 of the agreement and that in any event the plaintiff had until 31 May 2001 to effect payment. This letter was followed two day later by a further letter .by the plaintiff's legal practitioner in which the first defendant was given fourteen days within which to purge its failure to comply with clause 8 of the agreement. On 23 July 2001 the first defendant's legal

practitioners then wrote to the plaintiff giving notice in terms of clause 8 of the agreement that unless the sum of $1,5 million cash was paid within fourteen (14) days from the date of notice, the agreement of sale was to be cancelled. On 24 July 2001 this court then granted an order restraining the first defendant from selling, transferring or alienating any of its rights in stands 158, 3092, 3093 Prospect, pending resolution of a suit to be instituted by the applicant. On 15 August 2001 the plaintiff then instituted the present action for specific performance, alternatively damages. By letter dated 20 August 2001, the first defendant's legal practitioners addressed a letter to the plaintiff advising that owing to its failure to pay the sum of $1,5 million, the contract had now been cancelled. It is apparent that further proposals were made by the plaintiff to vary the contract but these were not accepted. In November 2001 the second defendant then terminated its agreement of sale with the first defendant.

Despite the various issues identified in the pre-trial conference minute, it is clear there is one basic issue. That issue is whether the plaintiff failed to comply with the terms of payment or put another way whether the first defendant was entitled to cancel the contract as it did.

The only witness for the plaintiff was Elizabeth Chidavaenzi, its director. She told the court that her understanding of the plaintiff's obligations under the contract was that a deposit of $1,5 million was payable by 31 May 2001 and the balance of $1,5 million by instalments over a period of twelve months. Sometime in mid-April 2001, Mr Chokwenda phoned her and advised that he had found another buyer who had offered a higher sum and that he was cancelling the agreement. Thereafter in April 2001 she phoned Mr Chokwenda offering to pay the sum of $1,5 million to resolve the problem. He banged the phone on her. It was her evidence that when Mr Chokwenda forwarded a letter dated 24 May 2001 advising of a breach, the deposit was still not due in terms of the agreement. On 17 May 2001 she became aware that the property had been sold to Rutima Developers (Pvt) Ltd, the second defendant. She then approached her legal practitioners who wrote the first defendant's legal practitioners advising that no valid notice in terms of clause 8 had been given. She told the court she did not pay the deposit by 31 May 2001 because Mr Chokwenda had refused to accept the payment. She still tenders payment in terms of the agreement. On the question of damages, she told the court the plaintiff expected to earn about $7,0 million in profit out of this venture. She produced a schedule which shows how the figure has been arrived at.

Under cross examination the witness admitted that the bank guarantee referred to in the special conditions is different from a cash payment. She also admitted that in terms of the special conditions a bank guarantee was to be provided by the plaintiff within sixty (60) days of the signing of the agreement. She agreed that she did not provide a bank guarantee within 60 days or made payment by 31 May 2001. She told the

court however that after Mr Chokwenda phoned her in mid-April 2001 advising that he was canceling the agreement she offered to pay the cash deposit of $1, 5 million but he refused. She also admitted that it had been part of the plaintiff's case that clause 2 of the special conditions contains a suspensive condition in terms of which payment would depend on the grant of a permit by the local authority. She conceded this is not correct.

Further questioned, she told the court she was given fourteen (14) days to pay the deposit of $1,5 million by letter dated 23 July 2001. She did not pay because she believed the letter "was trying to go round the summons" and the property had also been sold to the second defendant. She felt the plaintiff could not pay for a property which had also been sold to another party. Asked whether the first defendant was not offering to give effect to the agreement if plaintiff complied and paid within fourteen (14) days, she told the court the plaintiff did not refuse to pay. Asked why having issued summons against the first defendant the plaintiff offered to re-negotiate the terms she told the court that the plaintiff's position was that although the first defendant had sold the property to someone else, the plaintiff was offering more as it wanted this property. She denied this was done because the plaintiff realised it was in breach.

The first defendant called two witnesses. The first was Margaret *Harvey,* a professional assistant with Messrs Byron Venturas & Partners. She became involved in this matter when the plaintiff filed an application for an interdict against the first defendant. She denied that the plaintiff tendered payment at the hearing of the application. Because she believed the notice given on 24 May 2001 was not a cancellation, she gave written notice to the plaintiff in July 2001 to rectify the breach failing which the agreement would be terminated. There was no response and no payment and accordingly on 20 August 2001 she advised the plaintiff that the sale had been cancelled. Thereafter Miss Chidavaenzi phoned her in August 2001 asking if the first defendant was willing to re-negotiate the agreement. She then wrote saying this had not been accepted.

Under cross-examination, she admitted that the plaintiff had been given until 31 May 2001 to pay in cash and that any demand made before then would have been premature. She admitted that when she put the plaintiff on terms she was aware of the sale of the property to the second defendant. Her approach to the matter was that if the plaintiff had complied with the conditions then the breach would have been remedied and the plaintiff would have been entitled to specific performance. She also admitted that the cash deposit was due by 31 May 2001 and the balance

was to be secured by bank guarantee which was to be produced within sixty (60) days of the signing of the agreement. It was also her evidence that had the plaintiff made good the breach the agreement entered into between the first respondent and Rutima would have been cancelled as eventually happened.

The first defendant further called David Chokwenda, son to Claude Chokwenda who is now deceased and also a director of the first defendant. His evidence was as follows. The family was in financial problems. His father needed to sell the property in question to raise money. He was not himself involved in the present matter or the sale of the property to Rutima. He admitted that in terms of the agreement payment was due by 31 May 20001 and that the letter written on 24 May 2001 was premature.

The question that arises is what the terms and conditions of payment were. There is no doubt that the agreement was most inelegantly drafted and consequently there has been argument about what the exact terms of payment were. It is common cause between the parties that, despite the wording of paragraph 1 of the special conditions, the cash deposit of $1,5 million was payable by 31 May 2001. There is dispute as to when the balance of $1,5 was to be paid. The general provisions of the agreement say this was payable within twelve months from the date of agreement. The special conditions however, provide for a bank guarantee within sixty (60) days of signing of the agreement. This would mean a bank guarantee was to be provided at the latest by 11 April 2001. The position seems to be that whilst a bank guarantee was to be provided within sixty (60) days of signing the agreement, the actual cash was due by 8 February 2002. It is not however necessary to made a definitive finding on this matter.

It is not in dispute in this case that no cash deposit was paid by 31 May 2001 and no bank guarantee was provided as agreed. Miss Chidavaenzi's evidence was that in April 2001 she became aware that the first defendant was attempting to sell the property to another party as a result of which she tendered payment of the deposit but this was turned down. This seems highly unlikely given the contents of the plaintiff's summary of evidence in which no reference is made to such tender and also taking into account the fact that up until the first day of trial, it had been the plaintiff's position that no payment was due until a permit had been granted by Council. Whatever the position might have been what is clear is that no payment was made and no bank guarantee provided.

In terms of clause 8 of the agreement in the event either party committed a breach and failed to remedy the same within fourteen (14) days of written notice to do so two situations are provided for. If it is the

purchaser who is in default, the seller shall have the right to cancel the agreement and claim damage or alternatively enforce it and claim interest on the outstanding balance of the purchase price at the Reserve Bank Re-discount Rate. If it is the seller the purchaser shall have the right either to cancel the agreement or alternatively enforce it and in either case claim damages.

It is clear from the provisions of clause 8 that in order to cancel the agreement either side was obliged to give the other fourteen (14) days written notice to remedy the breach. Only if there was failure to comply with such notice would the one party have the right either to enforce or terminate the agreement.

In this case, a letter was written by the late Chokwenda on 24 May advising that a breach had been committed. It is now common cause that that letter did not constitute valid notice as payment in terms of the agreement was only due on 31 May 2001. In consequence the letter dated 13 July 2001 by the first defendant's legal practitioners drawing attention to the letter of 24 May 2001 advising of cancellation was also not valid. It is what happened thereafter which is pertinent as it is clear both parties made frantic efforts to comply with clause 8 of the agreement. By letter dated 19 July 2001, the plaintiff's legal practitioners gave the first defendant fourteen (14) days within which to purge its failure to comply with clause 8 of the agreement failing which action would be taken to enforce the contract and claim any damages arising out of such breach. My assessment of the contents of this letter is that the plaintiff was calling on the first defendant to honour its obligations in terms of the contract. The obligations would include the acceptance of payment in terms of the contract and generally honouring that contract.

In response and clearly to comply with clause 8 the first defendant's legal practitioners wrote to the plaintiff on 23 July 2001 reminding the plaintiff of its obligation to pay the sum of 1,5 million by 30 May 2001 and further advising that if payment was not made within fourteen (14) days of the date of the notice the agreement was to be cancelled. The sum was not paid within fourteen days. In the meantime however the plaintiff was granted an order by this court interdicting the first defendant from selling, transferring or alienating any of its rights in stand 158. On 15 August 2001 the plaintiff then instituted the present action. The first defendant then cancelled the agreement by letter dated 20 August 2001.

In terms of the agreement, the plaintiff was not entitled to enforce the contract unless fourteen days notice was first given to the first defendant to remedy any breach. This the plaintiff did by letter dated 19 July 2001. What did the first defendant do? By letter dated 23 July 2001 it called upon the plaintiff to pay the cash deposit within fourteen days failing which the contract would be terminated. No such payment was made. No tender of such payment was made. Instead the plaintiff then instituted the

present action on 20 August 2001.

On the facts it is clear that both parties were in breach of clause 8. The first defendant was in breach by purporting to cancel the agreement without giving the plaintiff proper notice in terms of the contract and thereafter attempting to sell the property to the second defendant. The first defendant gave notice to the plaintiff to pay deposit. The plaintiff did not tender the purchase price, which would have been held in trust pending transfer in terms of paragraph 2 of the general conditions. Instead, without itself performing, the plaintiff instituted the present action to enforce the agreement. This the plaintiff was not entitled to do in terms of the agreement. The fact that Ms Chidavaenzi says she had previously offered the sum of $1,5 million to Mr Chokwenda in April 2001 is really neither here nor there as this was overtaken by attempts by both sides to comply with clause 8 of the agreement by giving the other the requisite notice. Further the fact that the plaintiff had successfully sought an interdict on the basis that the first defendant had purported to sell the same property to Rutima did not absolve it form its obligation to pay the cash deposit or to tender the same.

Accordingly I find that the plaintiff has not proved that it is entitled to the relief sought.

The action is accordingly dismissed with costs.

Mandizha & Company, plaintiff's legal practitioners

Byron Venturas & Partners, 1st respondent's legal practitioners.