SALFGIA ENTERPRISES (PRIVATE) LIMITED
versus
PANGANI JOSEPH MASHAVA

HIGH COURT OF ZIMBABWE
CHITAKUNJE J
HARARE, 30 October 2003 and 11 February 2004

Opposed Matter

Adv *Zhou* for applicant
Mr *Chinyama* for respondent

CHITAKUNYE J: The two parties Salfigio Enterprises (Pvt) Ltd (as purchaser) and Pangani Joseph Mashava (as seller) entered into an Agreement of Sale on the 28th October 1998. The subject of the Agreement of Sale was described as 'certain piece of land situate in the District of Salisbury, being Excelsior, measuring 524, 0420 hectares, otherwise known as Mashava Farm Beatrice.

The agreement provided amongst others that:

The purchase price for the property is Z$1 240 000,00. The purchaser shall pay a deposit of $400 000,00 as follows:

"1. $130 000,00 to be paid on signing of the agreement.

2. The balance of $270 000,00 to be paid 21 days from the date of issue of the certificate of no present interest from the government of Zimbabwe. Balance of $840 000,00 in instalments of $150 000,00.

Payment shall be made to Borm Real Estate and the payments should be placed in an interest bearing trust account for the benefit of the seller and no collection fee shall be charged".

After the signing of the agreement the parties naturally, expected fulfilment of all the terms and conditions to the Agreement.

On the 12th April 1999 the respondent, through his legal practitioners Byron Venturas and Partners, wrote a letter to the applicant titled.

"Cancellation of Agreement of lease entered into between Panganai Joseph Mashava and Salfigio Enterprises Pvt Ltd".

The letter alleged that the applicant had breached all the terms of the Agreement of Sale. The particulars of the breach included that the applicant failed to pay:

d) $130 000,00 upon signature

e) a further $270 000,00 within 21 days and

f) the balance of $840 000,00 which was supposed to be paid in instalments of $150 000,00.

Regarding what the letter was supposed to be the latter part of the letter provides:

> "Consequently we hereby give you Notice of intention to Cancel the Agreement.
>
> In the event that you intend to contest the termination of this Agreement, our instructions are to institute legal proceedings for the cancellation of the Agreement ….
>
> Unless we hear from you by the 31st May 1999 we shall consider that you have agreed with our client's claim and that the Agreement is mutually cancelled."

Though the headnote referred to the Agreement as a lease, it is clear that the main body was about the Agreement of Sale. The letter, whilst on the one hand purporting to be a Notice of Intention to Cancel the Agreement appears to also be cancelling the Agreement of Sale. The applicant was given 31 May 1999 within which to respond to the Notice of the Cancellation.

As "Notice" the letter would have to comply with the basic requirements for a valid notice. A proper notice should provide a period within which the other party has to remedy the alleged breach. Paragraph 11 of the Agreement of Sale is clear on this. The notice envisaged in para 11 is a notice calling upon the purchaser (applicant) to make good the breach within 60 days of the dispatch of notice. Clause 11 states:

> "In the event of the purchaser failing to pay any amount for which he is liable in terms of this Agreement by due date or in the event of the purchaser committing any other breach of this Agreement and failing to make such payment or rectify such breach within sixty (60) days of dispatch of written notice by the seller to the purchaser by registered post calling upon the purchaser to do so, the seller shall be entitled to cancel this agreement…."

A careful analysis of the respondent's letter of the 12th April 1999 shows that that letter did not conform to clause 11.

That letter did not call upon the applicant to rectify the alleged breach. It instead called upon him to indicate if he protested the cancellation. The letter gave the applicant up to 31 May 1999 to respond failure of which he would be deemed to have consented to the cancellation.

The period give, even if one were to take it as Notice is not 60 days. The period is certainly short.

The respondent's argument that the notice was valid because he only cancelled the agreement a year later is without merit. The issue is the validity of the Notice at the time he purported to issue it. The letter did not conform to what was expected of a Notice in terms of clause 11 of the Agreement of Sale.

After the respondent's letter of the 12th April 1999. The applicant through its lawyers wrote a letter to the respondent on the 11 May 1999. In that letter no reference is made tot he respondent's letter. It is apparent from this letter that there were serious problems in bringing the agreement to fruition.

It was in the light of the above that the applicant approached this court for remedy.

In his application the applicant seeks an order, that:

a) The Agreement of Sale between Penguin Joseph Mashava and Salfigia Enterprises (Pvt) Ltd for the sale of a certain piece of land situate in the District of Salisbury, being Excelsior measuring 524,0420 hectares otherwise known as Mashava Farm Beatrice, be and is hereby declared to be still in existence and to be binding on the parties.

b) Applicant has discharged its initial obligations to respondent, being payment of the initial deposit and of the sum of $270 000,00

c) The balance of the purchase price being $840 000,00 shall be in annual installment of $150 000,00 commencing 28 October 1999 and thereafter on the 28th of each and every successive year until the balance is liquidated. Interest shall accrue on the balance of $840 000,00 at the rate of 25% per annum during the first year (28th October 1998 to 28 October 1999) and thereafter increase by 10% annually on the balance.

d) Respondent shall make the title deeds of the farm available to Messrs Gutu and Associates on or before 28 October 1999 and the Deeds shall be without any encumbrances. The applicant's interest shall then be endorsed on the said Title Deeds.

A careful analysis of the case shows that major issues revolve around the respondent's purported cancellation of this Agreement of Sale. The

manner of the cancellation and reasons thereof are pivotal to the case.

I have already alluded to the purported notice of cancellation. My finding was that that notice was invalid. Not only did it not call upon applicant to rectify the breach but it was also too short. Clause 11 provided for 60 days notice yet this was shorter (about 49 days).

The respondent's purported notice of cancellation and cancellation was based on 3 alleged breaches. These breaches were contained in the respondent's letter of 12 April 1999. These included alleged failure by applicant -

(a) to pay the initial deposit of $130 000,00

b) to make a further payment of $270 000,00 within 21 days and

c) to pay $840 000,00 in instalment of $150 000,00.

The applicant contended that he was not in breach of any of the terms of the agreement of sale. On the issue of the initial deposit of $130 000,00, the applicant's contention was that upon signing the Agreement he tendered payment but the respondent intimated that he would rather have the motor vehicle the Applicant was selling.

They agreed on the value of $130 000,00 for the car hence the initial deposit installment was stated as $130 000,00. After the agreement the respondent took possession of the motor vehicle and transfer of ownership/registration of the motor vehicle to respondent was effected in November 1998. As far as applicant was concerned the car was given and transferred to respondent in lieu of the $130 000,00.

Thereafter though the agreement of sale stated that he would pay the balance of the deposit a sum of $270 000,00 within 21 days upon the issue of a certificate of no present interest. Upon the respondent's prevarication he paid some of that money even before the certificate of no present interest was issued. To that extent a list of the payments made to Born Real Estate before the issue of the certificate of no present interest was provided. Payments were made to Borm Real Estate as provided for in the agreement of sale (see clause 3 thereof).

The issue of the motor vehicle is quite interesting. It is common cause that the motor vehicle is in respondent's possession. It has been so since 1998.

Though the parties are not agreed as to how the motor vehicle came to be in respondent's possession it appeared not disputed that the motor

vehicle was registered in the respondent's name.

Paragraph 5 of the applicant's founding affidavit states *inter alia* that "however respondent intimated that he would rather have a motor vehicle I had in my possession, being a Nissan sunny HB 13, registration no. 695-138Y instead of the money. I agreed and transfer of ownership was effected in 1998".

In responding to this paragraph the respondent denied intimating that he would rather have the motor vehicle. He pointed out that the motor vehicle was left at his shop in his absence but his son was there. It was his son who later told him of the applicant having left the motor vehicle. On contacting the applicant he made it clear that he did not want the motor vehicle but the money. Respondent goes on to detail what he said took place between them clearly showing that he was not interested in the motor vehicle. Somehow the respondent does not deny that transfer of ownership took place despite applicant's specific allegation to that effect. In his replying affidavit the applicant reiterates the point that the respondent has had the motor vehicle since 1998 and has been using it. If indeed the motor vehicle was registered in respondent's name in 1998 and the respondent has been using it, naturally the need to explain the transfer and use of a motor vehicle he declined to accept *in lieu* of part deposit was necessary. Was the ownership or registration changed without his consent?

The respondent also contended that here was no written variation of the agreement of sale including the car and so the alleged variation was not true.

Indeed there is no written variation, but it is common knowledge that the respondent has had possession of the motor vehicle since 1998. If transfer and use of the car by respondent took place as stated by the applicant surely such cannot be ignored.

If as the respondent contended he had flatly rejected the offer of the car in lieu of the said deposit and had expressed his desire for cash one would not have expected the car to be transferred into respondent's name or that the respondent would be using the car.

The above scenario shows that the probabilities are that the parties discussed and came to some understanding on the car.

The second breach alleged by the respondent is that the applicant did not pay the balance of the deposit within 21 days.

In terms of the Agreement of sale the balance of $270 000,00 was to be paid within 21 days from the date of issue of the certificate of no present interest. That certificate was issued on the 1st of March 1999. The $270 000,00 was to be paid within 21 days from the 1st of March 1999.

In reality the payments towards the $270 000,00 started before the certificate of no present interest was issued. According to the applicant and Mr Mlambo as of the 1st March 1999 the applicant had paid at least $217 000,00 towards the $270 000,00 through Borm Real Estate.

The schedule of disbursements to P J Mashava (respondent) from Borm Real Estate from the money paid by applicant towards the $270 000,00 is as follows:

5 November 1998 cheque No. 770823 $45 000,00

26 January 1999 Cheque No. 844203 $$172 000,00

30 March 1999 Cheque No. 843945 $48 000,00

20 April 1999 Cheque No. 8345590 $5 000,00

There are however no dates showing when the applicant made payments to Borm Real Estate for Borm Real Estate to be able to disburse the above sums towards respondent's needs and obligations.

Thus as at the 12th April 1999 when Byron Venturas & Partners wrote a letter to cancel the Agreement of Sale the total of $265 000,00 had been disbursed by Borm Real Estate from money paid by applicant. The balance of $5 000,00 was disbursed to respondent on 20 April 1999.

In the absence of dates when applicant made payments to Borm Real Estate it is difficult to ascertain how much was outstanding at the expiration of 21 days from 1 March 1999. However going by the figure disbursed by the respondent's agents Borm Real Estate, it was not a substantial figure. Taking what was disbursed to be what had been paid by 1st March 1999, applicant had paid $217 000,00. This left a balance of $53 000,00 to be paid within 21 days from 1st March 1999. In terms of the Agreement of Sale the respondent was required to notify applicant of the breach and give applicant the requisite period within which to rectify the breach if the amount was not paid within the 21 days. This, the respondent did not do. I have already dealt with the respondent's purported letter of cancellation/notice.

The third breach regarded payment of the balance of $840 000,00 in instalments of $150 000,00. As conceded by both parties there was no specific mention as to whether these were monthly or yearly instalments.

What the parties intended must be discerned from the terms of the agreement.

The applicant argued that though there was no specific statement on instalments being monthly or annually the parties intended them to be annually. By the time the respondent purported to cancel the Agreement of Sale this instalment was not yet due.

In support of that view, the applicant referred to para 2 of the special conditions to the Agreement which states, *inter alia*, that interest on the balance of $840 000,00 shall be 25% and thereafter increase by 10% annually. Since the increase in the rate of interest was annually it follows that the instalments were annually. It would not make sense to provide for an increase in interest rates at annually when the instalment if paid monthly would not last a year.

The respondent on the other hand seemed to contend that the instalments were monthly. Unfortunately in his opposing affidavit, he did not dispute the applicant's assertion.

Para 3 of the respondent's opposing affidavit provides:

> "Ad paragraph 3 and 4
> These are admitted".

Paragraph 3 and 4 of the applicant's founding affidavit deals with the terms of the agreement. In para 4.3 applicant specifically stated that the instalment of $150 000,00 was to be annually.

The respondent having admitted the two paragraphs without reservation one wonders why it was sought to argue otherwise. The respondent's affidavit seems to deal with payments on the initial deposit paid and not on the manner the $150 000,00 was to be paid.

It was only in the respondent's Heads of Argument that the issue of when the instalments were supposed to have been paid is raised.

In paragraph 10 of the Heads of argument respondent's legal practitioner submitted that "the applicant contends that the instalment of $150 000 were annually. This is a wrong view of what the parties intended. It will not make sense for the respondent or any reasonable person to wait for more than 5 years to get the full purchase price. The instalments were monthly and they should have been completed within 7 months from the date of signing of the agreement".

These submissions are not supported by the respondent's affidavit. If

the applicant's view of what the parties meant was wrong, surely he would have responded to that in his opposing affidavit. Instead respondent chose not to dispute the applicant's paragraph containing these supposed wrong views. Indeed at today's galloping rate of inflation it may appear unreasonable that such instalment be annually but that was not the case in 1998. In 1998 $840 000,00 was considered a lot of money and for it to be paid in annual instalments of $150 000,00 would not by any stretch of imagination be deemed unreasonable. Clearly the parties meant the instalment to be annually.

At the time of the purported cancellation or notice to cancel the instalment was not yet due.

There was a contention by the respondent that the affidavit of Rushworth Mlambo only served to bring in more confusion and raised disputes of fact.

That is however not the case. Though the respondent tried to give the impression that Borm Real Estate was acting for the applicant in reality and in fact Borm Real Estates were the respondent's Agent. Mr Mlambo confirmed how Borm Real Estate came to be engaged by the respondent. It is through Borm Real Estate that all payments were to be made. It is not easy to believe that a seller would have agreed that a buyer's agent receive money from that same buyer on the seller's behalf. The Estate agent was there to protect the seller's interest. Mr Mlambo's affidavit confirmed the arrangement pertaining to the motor vehicle and the fact that it was given in *lieu* of the $130 000,00. Thereafter money was paid to Borm Real Estate by applicant towards the $270 000,00. Borm Real Estate as respondent's Agents went ahead to disburse the sums in accordance with respondent's instructions.

It is highly unlikely that Borm Real Estate would have known about respondent's financial obligations and gone ahead to meet some of them without respondent's instructions. For instance the respondent's financial obligation to AFC was something Borm Real Estate would have needed details of from the respondent.

It was therefore not true that the respondent did not know of any payments made on his behalf by Borm Real Estate.

All in all I am of the view that the respondent's purported cancellation of the agreement of sale was null and void.

It is thus declared that -

1) The Agreement of Sale is valid as the purported cancellation was null and void;

2) The applicant paid the deposit required as follows -
   a) surrendering the Nissan Sunny motor vehicle valued at $130 000,00 to the respondent; and
   b) payment of the $270 000,00 through Borm Real Estate which sum was quickly disbursed to meet respondent's obligations.

3) The balance of the purchase price being $840 000,00 was to be paid in annually instalments of $150 000,00 and not monthly.

4) The respondent will bear the costs.

Coghlan, Welsh & Guest, applicant's legal practitioners
Byron Venturas & Partners, respondent's legal practitioners