

NIGHERT SAVANIA
and
NORWICH TRADING (PVT) LIMITED
versus
NATHAN MNABA

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 25 September 2013 and 9 October 2013

Z.W. Makwanya, for the applicants
O. Hute, for the respondent

Opposed application

MATHONSI J: The applicants seek, by court application, an order confirming the cancellation of a sale agreement involving shares entered into between the first applicant and the respondent on 11 October 2011 and the eviction of the respondent from stand 750 Greystone Township of Greystone A, Harare as well as costs of suit on a legal practitioner and client scale.

The first applicant is the sole owner of all the shares of Norwich Trading (Pvt) Limited, a duly incorporated company whose only asset is stand 750 Greystone Township 10 Greystone A which it holds by Deed of Transfer No.11896/98. The first applicant and the respondent executed an agreement on 10 October 2011 a foresaid in terms of which the former sold to the latter his entire shareholding in the second applicant for a purchase price of US\$380 000-00 which was to be paid by an initial deposit of US\$125 000-00, paid at the time the agreement was signed. The balance of US\$255 000-00 was to be paid in 2 instalments of \$125 000-00 on or before 6 January 2012 and \$130 000-00 on or before 1 August 2012. Vacant possession was given to the respondent on 15 October 2011.

The agreement contained a penalty stipulation being Clause 9.2 which reads:

“9.2. In the event that the purchaser fail(s) to make any payment on or before due date or in the event that any judgement is taken against the purchaser in default or if any application is made for the winding up or judicial management of the purchaser, the seller shall have the right:-

9.2.1 To enforce the agreement in which event the whole balance outstanding together with interest and any arrears amount outstanding on the outstanding balance shall become immediately due any payable by the purchaser; or

9.2.2 To cancel this agreement, in which event all sums paid up by the purchaser shall be forfeited as rouwkoop in consideration of value for damages sustained by the seller.

9.2.3 Any election by the seller under this clause shall be in addition to and without prejudice to any other rights or claims which the seller may have arising upon any breach of this agreement by the purchaser.”

The respondent paid to the first applicant a total sum of \$273 800-00 towards the purchase price and, as is the case with anything human, he failed to pay the balance of \$130 000-00, after the first applicant, with his eyes firmly set on the cancellation of the agreement, returned \$23 800-00 to the respondents. The first applicant moved quickly to cancel the agreement having chosen to proceed in terms of Clause 9.2.2 of the agreement and to forfeit the sum of \$250 000-00 while at the same time reclaiming possession of the property.

When his efforts yielded negativity after the respondent remained firmly on the ground, the first applicant roped in the second applicant, and made this application seeking the order aforesaid, which is premised on the fact that after the cancellation of the sale agreement and the enforcement of the penalty stipulation, the applicants are entitled to stroll back onto the property unperturbed. The application is opposed by the respondent mainly on the basis that the penalty is out of proportion with the prejudice suffered which prejudice has not been set out to justify the decision to withhold the whole sum of \$250 000-00 paid towards the purchase price. The respondent also took issue with the prayer for eviction which only appears in the draft order when the founding affidavit is silent on it and the prayer for forfeiture of the purchase price as rouwkoop. He also claims an improvements lien over the property.

Mr *Hute* for the respondent took a point *in limine* that there are serious disputes of fact as cannot be resolved on affidavits and as such the matter should not have been brought by court application but by summons action. In his view the insistence by the first applicant on withholding the purchase price as a penalty and damages for breach of the agreement cannot be resolved on the papers placed before the court given the substantial amount that was paid which then begs the questions: What is the quantum of damages suffered by the first applicant as a result of the breach? Is the amount withheld proportionate to the prejudice suffered? If it is not, the extent to which the penalty should be reduced.

Mr *Makwanya* for the applicants retorted that the respondent went into the agreement with his eyes wide open, he breached the agreement, was given notice to remedy the breach in compliance with s8 of the Contractual Penalties Act [*Cap 8:04*], and must now face the consequences of the breach. Although he was unable to quantify the damages suffered by the first applicant, he took the view that Clause 9.2.2 of the agreement allows the first applicant to take the forfeit to the extent of all that was paid towards the purchase price. To him the respondent bears the onus to prove that the penalty stipulation is out of proportion and as he has not done so, the first applicant is entitled to the relief that he seeks.

While the agreement of the parties gives the first respondent an election, upon a failure by the respondent to make any payment before due date, to either enforce the agreement or cancel it and forfeit all sums paid towards the purchase price as *rouwkoop* in consideration of value of damages sustained, the court cannot blindly enforce such stipulation without regard to justice and fairness. Here we have a situation where the respondent paid the greater part of the purchase price leaving a smaller part. The first applicant claims the whole of it without even beginning to justify why he is entitled to it. The first respondent does not even ask the court to order forfeiture. To him it is enough for him to retain the money and seek only confirmation of the cancellation and an eviction of the respondent which has not even been pleaded.

Section 4 of the Contractual Penalties Act [*Cap8:04*] enjoins the court to act on a penalty stipulation if it appears to it that it is out of proportion. It provides:

- “(1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court.
- (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of the act, omission or withdrawal giving rise to liability under a penalty stipulation, the court may-
- (a) reduce the penalty to such extent as the court considers equitable under the circumstances; and
 - (b) grant such other relief as the court considers will be fair and just to the parties.
- (3) Without derogation from its powers in terms of sub s (2) a court may –
- (a) order the creditor to refund to the debtor the whole or any part of any instalment, deposit or other moneys that the debtor has paid; or
 - (b) order the creditor to reimburse the debtor for the whole or part of any expenditure incurred by the debtor in connection with the contract concerned.”

I have stated that the first applicant did not attempt to set out any prejudice that he may have suffered as a result of the breach. Neither did he attempt to justify why he is entitled to retain the \$250 000-00 paid towards the purchase price while also reclaiming the property. It is not enough for Mr *Makwanya* to simply say prejudice was suffered because the first applicant was not trading. In my view, the penalty appears out of proportion especially as the respondent was still showing a willingness to pay but had the money returned by a litigant bent of taking advantage of a slip up.

I am not equipped with any evidence upon which I may invoke the powers reposed in me by s 4(2) of the Contractual Penalties Act. The first applicant elected not to submit any such evidence. Therefore there exist disputes of fact which I cannot resolve by application procedure. As remarked by MAKARAU J (as she then was) in *Ex Combatants Security Co v Midlands State University* 2006 (1) ZLR 531 (H) 534 G-H 535 A-C:

“The resolution of the dispute without doing an injustice to the other party appears to me to be one of the prime considerations in allowing or disallowing the use of application procedures.-----

Further, a claim for damages arising from an alleged breach of contract, unless the damages are pre-set and agreed to between the parties, should not be brought on application procedure. A claim for damages by its very nature always puts in dispute the quantum of damages that are due to the applicant even where the defendant has not defended the matter. While a claimant may quantify his damages, the assessment of such damages is done by the court on evidence adduced and on principles of law applicable for that claim and on a comparative basis with decided cases.”

I have found that there are disputes of facts which I cannot resolve. Having done that I have to decide whether to dismiss the application by virtue of the use of wrong procedure or to stand down the matter to trial. Generally, where it should have been apparent to the applicant before undertaking application procedure, that disputes of fact exist as would not be resolvable on the affidavits, the court is at liberty to dismiss the application; *Williams v Tunstall* 1949 (3) SA 835(T); *Mavurudza v City of Harare* HH139/13.

Had it not been for the fact that the agreement of the parties ostensibly gives the first applicant sweeping powers to cancel the agreement and forfeit the purchase price, which may have encouraged the applicants to hazard an approach to this court by court application, seeking to enforce that provision I would have dismissed the application out of hand. I am however sympathetic to the applicants in light of the outrageous powers given to the first

applicant by the agreement. As it is I have had to rely on the provisions of s4 (2) of the Contractual Penalties Act, to achieve justice and not the mere interpretation of the agreement of the parties.

This court has the power and discretion to regulate its process. For that reason and in the interests of the concerned parties, I will stand the matter down for trial. I do not consider it necessary therefore to determine the question of costs at this stage as I believe the trial court will be best suited to do so.

Accordingly, it is that:-

1. This matter is hereby referred to trial with the documents filed of record all to stand as pleadings.
2. The parties are granted leave to file whatever additional documents they consider necessary for the purpose of completion of pleadings including the making of discovery in terms of the rules of court.
3. The costs of this application shall be costs in the cause.

Venturas and Samukange, applicants' legal practitioners
Hute and Partners, respondent's legal practitioners