

BRIGHTON MANENGURENI  
versus  
ZENEDIOUS KAKOMO  
and  
REGISTRAR OF DEEDS  
and  
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
DUBE J  
HARARE, 21 May & 23 July 2020

### Civil Trial

*C. Mavondo*, for plaintiff  
*E Motsi*, for first defendant

#### DUBE J

[1] The dispute between the parties arises out of an instalment sale of land. The plaintiff seeks enforcement of an agreement of sale.

[2] The background facts to this matter are generally common cause. On 31 October 2012, the parties entered into an agreement of sale in respect of certain piece of land situate in the District of Salisbury known as stand 53 of Subdivision E Portion of Lot E of Portion of Borrowdale Estate under Permit No SD/381, measuring 3609.05 square metres, hereinafter referred to as the property. The purchase price of the property was US\$60 000.00. The plaintiff was required to pay US\$20 000.00 upon signing the agreement. The outstanding balance would be paid in four instalments, the last being on 30 June 2013. The plaintiff paid a total of US\$54 000.00 leaving a balance of US\$6000.00 outstanding.

[3] The plaintiff accepts that he breached the agreement of sale by failing to pay US\$6000.00 which remains outstanding. The first defendant has refused to accept the balance outstanding and to effect transfer of the said property to the plaintiff. In October 2016, the defendant gave the plaintiff notice to rectify the breach and cancellation of the agreement. The plaintiff asserts that the notices were not given in accordance with the law. He seeks an order compelling the first defendant to accept payment of US\$6 000.00 as balance of the purchase price and transfer of the property to him. In the alternative, he claims cancellation of the agreement of sale and restitution of US \$54 000.00 , being part of the purchase price he paid,

general damages in the sum of US\$31 000.00, being the difference between the purchase price and the current market value of the property, all payable at the interbank rate.

[4] The second and third respondents did not defend the matter. The first defendant will henceforth be referred to as the defendant. The defendant defends the claim on the basis that he validly cancelled the agreement of sale after the plaintiff breached the agreement. He refutes that the plaintiff is entitled to cancellation of the agreement and transfer of the property and asserts that he is the one who is owed damages instead. The defendant is agreeable to restitution the plaintiff in the sum of US \$ 40 000.00.

[5] The issues referred to trial are as follows;

- “1. Whether or not the agreement of sale between the parties was validly cancelled
- 2. If it was validly cancelled, what is the quantum of restitution due to the plaintiff
- 3. If it was not validly cancelled , whether or not the property must be transferred to the plaintiff
- 4. If the property if not transferable to the plaintiff, what quantum of damages is the plaintiff entitled to.”

There was agreement at the pre-trial stage that any money to be refunded to the plaintiff shall be in local currency equivalent to the United States dollar at the prevailing interbank rate. The parties agreed that the defendant is still in control of the property.

[6] The plaintiff admitted in his evidence that he breached the agreement of sale in that he failed to pay the full purchase price for the property by 30 June 2013 when the last instalment was due. He received a letter dated 16 October 2016 from the defendant’s legal practitioners demanding payment of the outstanding balance within 7 days, failure of which the agreement would be deemed cancelled. He did not immediately respond to the letter, did no rectify the breach but sought audience with the defendant to discuss issues of concern before the expiry of the 7 days. He wanted to clarify from the defendant if rates and value added tax on the property had been paid and to ascertain the position of the cession agreement between the developer of the stands and the defendant before he made final payment. The breach was not deliberate.

[7] The cancellation is invalid because this is an instalment sale. The defendant gave him 7 days’ notice to rectify the breach instead of 30 days’ notice as required by the law. The defendant did not, contrary to the agreement of sale give him written notice for cancellation after the alleged failure to rectify the breach. The agreement is still extant. Although he was in breach, he is entitled to damages arising from the fact that the agreement was not validly cancelled. He paid US\$54 000.00 leaving a balance of US\$6000.00 and tenders the balance of the purchase price and seeks an order compelling the defendant to accept the balance

outstanding and transfer of the property. Alternatively, he seeks cancellation of the agreement of sale, refund of the money he paid and general contractual damages.

[8] The defendant testified that when the plaintiff failed to pay the full purchase price of the property, he wrote to the plaintiff giving him 7 days to rectify the breach and giving notice that if he failed to remedy the breach, the agreement would be cancelled. There was no separate letter of cancellation. He failed to rectify the breach and the agreement was accordingly cancelled. The offer to pay the balance of the purchase price was only made on 7 August 2018. By that time the agreement had already been cancelled. There was no separate letter of cancellation of the sale. The 7 days' notice to rectify the breach was sufficient since the period was agreed to. He is not prepared to accept the balance of the purchase price and transfer the property to the plaintiff. He is prepared to refund to the plaintiff US\$35 000.00 only. In his closing submissions he offered to pay US 40 000.00.

[9] It is common cause that the plaintiff breached the terms of the agreement of sale resulting in the defendant giving him notice to remedy the breach and cancellation of the sale. There are no disputes of fact arising from the facts. All the issues arising from this dispute are purely legal. All facts being common cause, the need to make any findings of fact and comment on the credibility of the witnesses falls away.

*Was the sale agreement validly cancelled?*

[10] An instalment sale is defined in s2 of the Contractual Penalties Act, [Chapter 8; 04], the Act as follows;

“**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;  
and ownership of the land is not transferred until payment is completed;”

[11] In *Nenyasha Housing Co-operative v Violine Sibanda* HH 456 \19 at p 4, the court defined an instalment sale and dealt the mischief and implications of s 8 of the Contractual Penalties Act as follows;

“An instalment sale is defined as a sale agreement which requires that payment of the purchase price be made in three or more instalments at by way of deposit and two or more instalments with transfer of the property which is subject of the sale being transferred after full payment of the purchase price ... The procedure to be followed by the seller entails him giving notice to rectify, discontinue or remedy the breach, followed by the institution of proceedings. The mischief behind this provision is to offer protection to purchasers in instalment sales. Where a purchaser in an instalment sale is in breach of the terms of the agreement, he is afforded an opportunity to rectify, discontinue or remedy the breach before proceedings for cancellation of the instalment sale are commenced. Where he is in breach and is able to remedy the breach within the time specified in the notice, the need to cancel the sale

falls away. Failure to give a purchaser notice to rectify, discontinue or remedy the breach renders the proceedings for cancellation of the contract a nullity.....”

See also *Zimbabwe Reinsurance Co Ltd v Musarurwa HH 141 /2002.*

[12] Clause 2 of the agreement of sale discloses that it is an instalment sale of land because the purchase price was required to be paid by way of deposit and two or more instalments with transfer of the property which is subject of the sale being transferred after full payment of the purchase price.

[13] Section 8 of the Act provides for the procedure for cancelling an instalment sale and stipulates as follows,

**“8 Restriction of sellers’ rights**

- (1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser—
  - (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
  - (b) terminate the contract; or
  - (c) institute any proceedings for damages;
 unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.
- (2) 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 specified in the notice, which period shall not be less than—
    - (i) the period fixed for the purpose in the instalment sale of the land concerned; or
    - (ii) thirty days;
 whichever is the longer period.”

[14] In terms of s 8 (1), a seller under an instalment sale of land is required to give notice in writing to the purchaser to rectify the breach before the seller cancels the sale agreement and institutes proceedings for damages .The purchaser must be given clear and unequivocal notice of an intention to cancel the contract. The amount owing in terms of the breach must be stated in the notice to rectify the breach. The party in breach must be given a reasonable time within which to remedy the breach. The time within which to remedy the breach must be specified in the notice.

[ 15] The import of s8 (2) (c) is that the period to remedy the breach must not be less than the period specified in the instalment sale agreement or 30 days whichever is the longer period. A seller intending to cancel an instalment sale must ensure that the notice period given is not less than the period specified in the agreement of sale and is not less than the period of 30 days stipulated in s 8(2) ( c) of the Act. This is so even where the parties have agreed on a lesser

period in the instalment agreement. The dictates of the statute have to be complied with. If the actual cancellation of an instalment sale or failure to rectify the breach relied on is either premature or invalid for whatever reason, the subsequent cancellation of the instalment sale agreement is rendered invalid.

[16] *In casu*, the cancellation clause is found in clause 9 and reads as follows;

#### **“THE BREACH**

Notwithstanding anything to the contrary herein contained and notwithstanding any extension of time and indulgence or concession granted by the seller to the Purchaser, If the purchaser shall omit to observe or perform any of the terms , conditions or stipulations therein contained, and fail; to rectify the same within seven days (7) after receipt of written notice from the seller requiring him to do so, the Seller shall forthwith have the right by giving notice in writing to the Purchaser, to cancel this agreement, to resume possession of the property, together with any improvement which may have been effected thereto , and to retain as and by way of agreed pre-estimate of liquidated damages all sums of money which may have been paid or deposited by the Purchaser as security , or alternatively at his option , to sue the Purchaser for the balance or the purchase price against tender to him of the said property.”

[17] Clause 9 lays out the procedure to be followed in the event that the purchaser breaches any of the terms and conditions of the agreement. Upon breach by the purchaser, the seller is required to give him 7 days written notice to rectify the breach. The import of the cancellation clause is that if the purchaser “fails to rectify the breach within seven days (7) after receipt of written notice from the seller requiring him to do so, the Seller shall forthwith have the right by giving notice in writing to the Purchaser, to cancel this agreement” and to resume possession of the property together with any improvements and to retain as and by way of agreed pre-estimate of liquidated damages, all sums of money which may have been paid or deposited by the Purchaser as security , or alternatively at his option , to sue the Purchaser for the balance or the purchase price against tender to him of the said property.

[18] The intention of the parties must have been that in the event of any breach, the purchaser having breached the agreement would first be entitled to notice to remedy the breach. Failing compliance with the notice to rectify the breach, the notice would be followed by written notice to cancel the agreement. The seller is only entitled to give notice of cancellation of the sale upon the expiry of the notice to rectify the breach. In essence, the notice to rectify the breach is required to be given separately from the notice of cancellation and must be given in writing, with the notice of cancellation following upon the expiry of the notice to rectify the breach. Only after establishing that the notice to remedy the breach has elapsed, is the seller entitled to

give the notice of cancellation. Clause 9 does not anticipate that the notice to remedy the breach would be combined with the notice of cancellation.

[19] Notwithstanding the provision in the agreement for 7 days' notice to rectify the breach, the defendant was required to give the plaintiff 30 days in terms of s8 of the Act. The 7 day period within which to remedy the breach provided for is shorter than the 30 days stipulated in s8 of the Contractual Penalties Act. In that event, the plaintiff was entitled to be given 30 days' notice to rectify the breach, which is the longer period. The plaintiff was not lawfully placed in *mora* because he was given 7 days' notice and not the statutory 30 days' notice to rectify the breach as required by s8 of the Contractual Penalties Act.

[20] The cancellation procedures prescribed in terms of s8 of the Contractual Penalties Act and the agreement of sale itself must be meticulously followed. The notice to cancel the agreement was required to be given upon expiry of the notice to remedy the breach and independently in writing. This did not happen. The same letter to rectify the breach included in it notices that if the purchaser did not rectify the breach, the agreement shall be deemed cancelled. The notices to remedy the breach and the notice to cancel the sale were inappropriately rolled in one. The notice to cancel the sale was premature having been given before the expiration of the notice to rectify the breach. The agreement of sale was not lawfully cancelled. The plaintiff fell foul of both s 8 of the Contractual Penalties Act and clause 9 of the agreement of sale which must be read together.

*Effect of failure to correctly cancel the agreement*

[21] Christie in Law of Contract in South Africa, 6<sup>th</sup> ed, on p 562, states that where a contract lays down procedures for cancellation of a contract, these must be followed otherwise the purported cancellation becomes ineffective. In *Zimbabwe Express Services (Pvt) Limited v Nuanetsi Ranch Private Limited* 2009 (1) ZLR 326(S) the court dealt with a case where a seller failed to terminate a sale agreement correctly .The court held that the agreement still subsists. The failure to follow proper procedures to rectify the breach and issue a proper notice of cancellation of an instalment sale has no effect of invalidating the contract and has no effect of chipping away the breach. The party in breach remains in breach. In this case, the sale agreement was not validly cancelled and the agreement remained in full force and effect.

[22] After the purported cancellation, the defendant still had a legal basis upon which to cancel the sale on the basis of the breach albeit in a proper manner. The defendant was at liberty to issue fresh notices to cancel the agreement of sale. A defendant who fails to follow proper procedures in cancelling an instalment sale on the basis of breach of contract is not barred

from re -issuing the notice to rectify the breach and notice of cancellation, see the *Nenyasha Housing Cooperative* case.

[23] In this case the defendant has not sought to correctly cancel the agreement insisting instead that he correctly cancelled the sale. Where a seller or the innocent party in a contract fails to follow proper cancellation procedures, the longer he takes to correct improperly issued notices to rectify breach and cancellation of the agreement, the higher the risk that the party in breach may argue that the contract still subsists and that he is entitled to perform his part of the agreement. This is exactly what is happening here. The defendant seeks to ride on the plaintiff's failure to cancel the agreement correctly and seeks specific performance of the agreement, in the alternative, cancellation of the agreement, restitution of monies paid and damages.

[24] Specific performance is an order of court requiring that a contract be performed on the basis of its terms. It is a remedy ordinarily afforded to an innocent party in the event of breach by the other party resulting from his failure to adhere to terms of a contract. Generally, the remedy of specific performance is available to the innocent party. Wessels, *The Law of Contract in South Africa* vol 1parag 3135 states:

"The court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance on his part (Lawson, s 472, p522). A party is not entitled to a specific performance where he has failed to show that he has performed in terms of the contract. See also *Wilbert v Steenkemp* 1917 AD 493@ p499."

An order for specific performance enables the innocent party to compel performance of the terms of the contract upon breach. There must be a binding contract in existence and a breach of the terms of the contract. Courts will not order specific performance where there is substantial and material breach of the contract by the party seeking enforcement of the contract.

[25] *In the Zimbabwe Express Services (Pvt) Limited* case, the court dealt with a claim for specific performance by a party in breach. The court examined the circumstances surrounding the breach and refused specific performance after finding that there was nothing to suggest that the appellant itself was in a hurry to perform its side of the agreement and did not appear to have done much after payment of the deposit. The court considered the effect of inflation on the claim and held that an injustice would be caused to the other party if it were to order specific performance. The court emphasized that an order for specific performance is always at the discretion of the court and refuse to grant an order of specific performance.

[26] The court relied on sentiments from *Benson v South Africa Mutual Life Assurance Society* 1986 (1) SA 776(A) at 783 C-D, where it was held that the discretion of the court is;

*[not] ... completely unfettered. It remains, after all, a judicial discretion and from its very nature arises from the requirement that it is not to be exercised capriciously, nor upon a wrong principle (Ex parte Neethling (supra at 335). It is aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, e.g. if, in the particular circumstances, the order will operate unduly harshly on the defendant.”*

The court held as follows;

“Most importantly, however, as this Court has found, an order of specific performance would no doubt operate unduly harshly on the respondent and would undoubtedly result in the appellant being unjustly enriched at the expense of the respondent. The finding of the court a quo to this effect cannot be impugned. Whilst accepting that the agreement was not lawfully terminated an order of specific performance would not in these circumstances be appropriate”.

[27] What emerges is that specific performance is an equitable remedy and is one strictly in the discretion of the court, which discretion must be exercised judiciously upon consideration of all relevant factors. Special considerations in granting an order for specific performance include undue delays in performing the agreement, undue hardship and unjust enrichment occurring to the other party as a result of the order for specific performance. Each case is required to be decided on its own circumstances.

28] An order for specific performance against the defendant would be inappropriate in the circumstances of this case. The court has considered that the defendant was not in breach. The plaintiff was on his part not in a hurry to perform his side of the agreement and is the one in breach. Time was of the essence in this contract .The plaintiff was required to pay the last instalment by June 2013. He did not pay the balance leading the defendant to give him notice to remedy the breach and cancellation in October 2016, three years later. Even after receiving the notice to remedy the breach, and purported cancellation of the agreement, he was not perturbed. The delay in paying the balance outstanding is unwarranted. He chose instead to pick on the defendant and enquire about peripheral issues which need not have stopped him from paying the purchase price in full. He used these as an excuse for not paying the money outstanding. He either deliberately refrained from paying or had no means to pay and resorted to delaying tactics. He made no effort to pay the balance of the outstanding money until March 2018 when he offered to pay. For 5 years and some months, he continued in breach until he issued summons in October 2019. He effectively abandoned the agreement of sale and cannot be allowed to choose when to pay up and perform the contract and compel transfer when it suits him. The equities of this matter demand that specific performance be declined.

[29] Courts will not grant specific performance to a party in breach where he is shown to have previously abandoned the contract and where there are undue delays in performing his part of the bargain. A buyer of property who fails to perform his own obligations under a contract of sale takes a risk when he neglects to fulfil terms of the contract. He has only himself to blame when courts refuse to compel the other party to receive late payments and transfer of property to him.

[30] The plaintiff has asked the court to cancel the agreement on the basis that it is has become impossible to perform and grant him an order for general damages of US \$31 000.00 being the difference between the purchase price of US \$54 000.00 and US\$85 000.00 being the current value of the property. The plaintiff claims damages on the basis that the agreement was not validly cancelled. No authority was advanced for such a proposition. Both parties seem content to cancel the agreement. The plaintiff cannot get an order for damages when he has no entitlement to enforce the contract and obtain specific performance. The plaintiff's recourse lies in a refund.

[31] The defendant is agreeable to refund part of the purchase price and offers US \$40 000.00 payable at the Interbank rate to the plaintiff. He told the court that he suffered damages in that his time was wasted following up on the debt valued at US\$6000.00, he lost US \$15 000.00 being loss of equipment to creditors and US\$3000, 00 being loss of business income. He deducted from the monies paid these amounts totalling us \$ 30 000.00, leaving a balance of \$34 000 .00. His mathematics is not impressive as based on his claims the balance ought to be US \$34 000.00.In any event, the defendant did not file a counterclaim and the damages allegedly suffered are not provided for in the agreement of the parties.

[32] In terms of the agreement of sale between the parties, no provision was made for the defendant to retain the purchase price upon breach or termination of the agreement of sale. Any retention of the purchase price or part thereof could only be in lieu of damages in terms of clause 9. In the absence of any clause guiding what is to happen to amounts paid on cancellation of the agreement and failure to justify the refund suggested, the court is guided by the provisions of s4(3)(a) of the Contractual Penalties Act and orders the defendant to refund to the plaintiff all moneys paid to it .

[33]The plaintiff has not shown any entitlement to an order for specific performance. He is entitled to refund of monies paid.

Accordingly it is ordered as follows;

1. The plaintiff's claim for specific performance is dismissed.
2. The agreement of sale in respect of stand 53 of Subdivision E Portion of Lot E of Portion of Borrowdale Estate under Permit No SD/381, measuring 3609.05 square metres is hereby cancelled.
3. The respondent shall restitute the plaintiff in the sum of US 54 000.00 payable at the interbank rate.
4. The plaintiff shall pay the respondent's costs

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