Judgment No. SC 73/06
Civil Appeal No. 357/05

JOINA DEVELOPMENT COMPANY (PRIVATE) LIMITED

v

(1) NEWGALE INVESTMENTS (2) THE REGISTRAR OF DEEDS N.O

SUREME COURT OF ZIMBABWE
ZIYAMBI JA, GWAUNZA JA & GARWE JA
HARARE, NOVEMBER 28, 2006 & MAY 31, 2007

J B Colegrave SC, for the appellant

E T Matinenga, for the first respondent

No appearance for the second respondent

ZIYAMBI JA: On 3 November 2005, the High Court dismissed an application by the appellant for an order of specific performance sought in the following terms, as expressed in the draft order attached to the application:

> "It is ordered that:
>
> 1. The first respondent shall do all such acts and sign all such documents as are necessary to pass transfer of a certain piece of land called a certain piece of land situate in the District of Salisbury called Subdivision D of subdivision C of Lot 15 Block C of Avondale, (*sic*) (the property) to the applicant within seven (7) days of service of this order on it, failing which the Deputy Sheriff Harare is hereby empowered and directed to do all such acts and sign all such documents on behalf of the first respondent.
>
> 2. The second respondent shall approve and register the transfer in accordance with para 1 above.

3. The first respondent pays costs of suit."

The appellant was aggrieved by this order and now appeals to this Court.

The facts forming the background of the appeal are as follows.

On 29 May 2003 the parties entered into an agreement in terms of which the first respondent sold, and the appellant purchased from the first respondent, certain property known as Subdivision D of subdivision C of Lot 15 Block C of Avondale, ("the property"), for an agreed sum of $206 million payable in full on or before 30 June 2003. The appellant failed to pay the purchase price by that date and, on 2 July 2003, the appellant's legal practitioners wrote to the first respondent's legal practitioners confirming that the appellant was in breach of the agreement and offering to make payment the following week. When, by 30 July 2003, payment had not been made as promised, the parties held a meeting at which it was agreed that the purchase price would be paid in full on 30 September 2003.

Notwithstanding this agreement, by 9 March 2004 the purchase price had not been paid and, following a letter of demand from the first respondent's legal practitioners, negotiations took place between the parties culminating in an agreement to novate the old agreement by a Deed of Sale Agreement. In terms of that agreement the appellant was to draw up the Deed of Sale Agreement showing the terms of payment as well as the outstanding purchase price. The first instalment on the outstanding purchase

price was to be paid on 15 March 2004 while the final payment was to be made on 16 April 2004. The purchase price was agreed to be $400 million.

Yet again, no payment was made on 15 March 2004 and a meeting held on 23 March 2004 did nothing to remedy the situation. As a result, on 14 April 2004, the first respondent's legal practitioners wrote to the appellant's legal practitioners informing them that the appellant was withdrawing from the sale agreement. Despite that letter, however, the parties continued with their negotiations and the appellant paid the full purchase price of $400 million in May 2004.

The narrative continues in the words of the court *a quo*:

> "What follows hereunder was hotly contested. According to the applicant trouble started when it sought to have the first respondent transfer the property into its name as the first respondent began to raise the issue of late payments. The first respondent did not end there. It also sought to have the price increased for a second time from $400 million to $3 billion. The suggestion was rejected by the applicant. However, the parties still continued with negotiations and held various meetings. The meetings were fruitless leading to the collapse of the negotiations.
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> Thereafter the first respondent sought to resile from the agreement by refunding the sum of $400 million paid to it by the applicant pursuant to the agreement. But the refund cheques were dishonoured on presentation to the first respondent's bankers. The first respondent then forwarded another cheque drawn on Century Bank in the sum of $400 million but the applicant through its legal practitioners refused to accept it and did not bank it. That was the applicant's story.
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> The first respondent had this to say. It averred that indeed negotiations continued after payment of $400 million. The negotiations resulted in the parties holding a meeting on 31 August 2004 where the first respondent made a new offer of $2.5 billion which was allegedly accepted by the applicant.
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> Since the applicant had already paid $400 million it undertook to settle the outstanding $2.1 billion by paying $1.9 billion by Tuesday 7 September 2004 and the remaining $200 million in two instalments.
>
> Needless to say the applicant once more failed to pay as agreed. It then addressed a letter of cancellation of agreement on 3 September 2004 which it marked 'Without Prejudice'. The letter is reproduced in part below.

'2 September, 2004

WITHOUT PREJUDICE

Dear Sir

TERMINATION OF AGREEMENT IN RESPECT OF THE SALE OF THE GT BAIN CENTRE

Further to the meeting held at your offices on a without prejudice basis on 31 August, 2004, we regret to advise that our clients have not been able to finalise funding to meet your client's revised offer. Therefore the parties need to abandon the transaction and resolve the monetary issues arising accordingly …'

The applicant did not deny the above averments by the first respondent in its replying affidavit. They, therefore, stand uncontroverted. What comes out from the above averments is that the parties novated the Deed of Sale agreement on 31 August 2004. The applicant accepted the first respondent's offer at a purchase price of $2.5 billion payable as reflected above. The parties were therefore governed by the 31 August agreement. The applicant's suggestion that the parties were still governed by the 9 March, 2004 Deed of Sale cannot be correct in the light of the undisputed averments of the first respondent. The applicant in fact made an effort to implement the terms of the agreement of 31 August, 2004 but failed hence the admission that it had 'not been able to finalise funding to meet your client's revised offer'. It therefore, seems to me that the parties were acting in terms of the 31 August 2004 agreement which novated the 9 March 2004 Deed of Sale.

Having arrived at the above conclusion it seems to me that I should also find as a fact that after the letter of cancellation of 14 April 2004 the parties continued to negotiate and held various meetings culminating in the agreement of 31 August 2004. That being the case the need for me to deal with the issue of whether or not the Deed of Sale concluded between the parties falls within the purview of s 8 of the Contractual Penalties Act [*Cap 8:04*] does not arise at all as the parties novated it and concluded a fresh agreement."

I find no fault with the reasoning of the learned judge in the court *a quo* as set out above.

The appellant initially sought in its notice of appeal an order setting aside the judgment of the court *a quo* and replacing it with an order for specific performance alternatively, one for damages in the sum of $2.500 000 000 with interest at the prescribed rate from 13 September 2004 to the date of final payment. However, when the parties first appeared before this Court, Mr *Colegrave* made an application to amend the notice of appeal to include the following paragraphs:

> "3.1. Alternatively, having found that the letter (of the 2 September 2004) was properly produced, the Court erred in failing to find that the terms for settlement set out therein were, in the absence of any communication to the contrary, accepted by the first respondent but not complied with by it."

And after para 4 of the following paragraph:

> "5. The court erred in failing to pay due regard to the interest which the first respondent earned upon the sum of $400 000 paid to it by the appellant."

To the prayer was added the following:

> "4. Further in the alternative, and in the event of the first respondent being unable to transfer the property, the first respondent is hereby ordered to pay the appellant the sum of $832 717,00 together with interest thereon at the prescribed rate from 13 September, 2004.
>
> 5. Further in the alternative, and in the event of the first respondent being unable to transfer the property, the first respondent is hereby ordered to pay the appellant the sum of $400 000 together with interest thereon at the prescribed rate from the dates upon which the sums making up the $400 000 were paid by the appellant to the first respondent."

The matter was postponed *sine die* in order to afford the first respondent an opportunity to file supplementary heads of argument dealing with the points raised in the

notice of amendment. The issue of costs was reserved for determination at the hearing of the appeal.

As indicated above, the learned judge correctly found that the Deed of Sale Agreement concluded on 9 March 2004 was again novated by an oral agreement on 31 August 2004 and that that agreement was repudiated by the appellant by the letter dated 2 September 2004. The innocent party was, as in all the previous breaches, the first respondent, whose prerogative it was to accept the repudiation of the contract and claim damages for its breach from the appellant. See The *Law of Contract* in South Africa 3 ed by R.H.Christie, at p 597. See also *Myers v Abramson* 1952 3 SA 121 (C).

We were advised by counsel for the respondent that the sum of $400 million was returned to the appellant. In my view, the appellant cannot seek to be rewarded for its unlawful conduct by now claiming interest on that payment. In any event, the alternative relief now being sought on appeal was not sought in the court *a quo* and is now being sought for the first time on appeal. It was not competent for the appellant to raise these fresh claims on appeal. Further, as no argument was addressed to the court *a quo* in respect of these grounds of relief, there is no evidence on record which can be considered by this Court in arriving at a conclusion on the new issues raised before us. The procedure adopted by the appellant is therefore untenable.

I conclude, therefore, that the appeal is devoid of merit and it is accordingly dismissed with costs.

As to the wasted costs of 19 September 2004, Mr *Matinenga* fairly submitted that each party should pay its own costs and it is so ordered.

GWAUNZA JA: I agree.

GARWE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

Costa & Madzonga, first respondent's legal practitioners