

REPORTABLE (2)
Judgment No. SC 2/03
Civil Appeal No. 186/02

(1) George Pedzisai Fichani
(2) Wendy Bob Mutukura Fichani
V Johannes Conrad Makonye

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & ZIYAMBI JA
HARARE, JANUARY 14 & FEBRUARY 17, 2003

T Masendeke, for the appellants

E W W Morris, for the respondent

CHEDA JA: The parties to this appeal entered into a written agreement on 28 October 1999 in which the appellants purchased from the respondent certain immovable property known as Stand 265 Mount Pleasant Township 9, Harare, measuring 4 125 square metres, for the sum of \$3 200 000.00.

It was agreed that \$1 000 000.00 (one million dollars) was to be paid upon the signing of the agreement and the balance of \$2 200 000.00 would be paid as follows –

- (1) \$1 118 333.00, which included interest at 35%, was to be paid on or before 1 May 2000;
- (2) \$1 118 333.00, which included interest at 35%, was to be paid on or before 1 November 2000; and
- (3) \$1 118 333.00, which included interest at 35%, was to be paid on or before 1 May 2001.

The agreement also provided the following clause:

"7. Breach

7 (1) Should the purchaser fail to make payment of any instalment on the due date thereof, or should he commit a breach of any of the terms and conditions of this sale, then and in such case the seller shall be entitled to give to the purchaser notice in writing requiring him to make such payment or remedy such breach within thirty days of posting such notice and if the purchaser fails to do so, the seller shall have the right forthwith –

- (a) to cancel the sale and to retake possession of the property hereby sold, without prejudice to any right of the seller to claim damages. In the event of cancellation, the purchaser shall pay to the seller interest at the rate of 35% per annum compounded at the 1st day of each month on the outstanding balance at the date of such breach. The said interest shall be calculated as damages and shall be deducted from any monies held by the seller.
- (b) to sue for the recovery of the whole of the unpaid balance of the purchase price and all interest due thereon. No waiver, express or implied, by the seller of the breach of any term or condition in this Agreement shall constitute or waiver of any subsequent breach, of alike or other term or condition (*sic*).

The deposit was paid timeously, but the appellant paid the first instalment late, in the sum of \$1 200 000.00 instead of \$1 118 333.00.

The instalment due on 1 November 2000 was not received and there was no communication from the appellants explaining why they could not pay. A letter was written to the first appellant on 2 November 2000, giving the appellants notice in terms of the agreement and giving them thirty days within which to pay.

On 30 November 2000, following a telephone conversation, the respondent wrote a reminder but the appellants still failed to pay the instalment.

On 2 December 2000 the respondent wrote a letter cancelling the sale agreement.

The respondent says in his affidavit that the court application he made was for the purposes of confirming the cancellation of the agreement.

The above facts are not denied by the appellants and are therefore common cause.

The appellants opposed the court application on the basis that they did not believe that the applicant (now the respondent) was serious in his threat of cancellation as he had previously made such threats but did not cancel and was merely putting pressure on them. The other reason was that after the agreement payment could be deferred pending their application for a loan from Beverley Building Society. The first appellant says the respondent had agreed to this. He says on applying for a loan, Beverley Building Society called for audited accounts for the appellants' company. This was in October 2000 when the respondent had asked if they would be in a position to pay their November instalment. The first appellant says he next spoke to the respondent in December 2000. The appellants said the order sought by the respondent should not be granted as they had agreed that the November instalment would be paid after they obtained a loan from Beverley and, in fact, once they got the bond the whole balance would be paid. However, the court *a quo* granted the respondent's application with costs.

This appeal is against that decision. Two grounds were given for the appeal, as follows –

"Grounds of Appeal

1. That the learned judge in the court *a quo* erred in finding that the requisite notice to cancel an instalment sale agreement in terms of the Contractual Penalties Act had been given.
2. That the learned judge erred in not finding that the agreement of sale had been varied to extend payment pending the final approval of a mortgage loan from a building society."

The first ground of appeal, which is explained in detail in the appellants' heads of argument, is to the effect that the notice of cancellation did not comply with s 8(2) of the Contractual Penalties Act ("the Act") [*Chapter 8:04*].

Section 8(1) of the Act requires that a seller should give written notice to a purchaser to remedy any breach before cancellation. Section 8(2) of the same Act reads as follows:

"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 land concerned; or
 - (ii) thirty days;

whichever is the longer period."

It was submitted that the letter sent by the respondent did not advise of the breach concerned. I do not agree. The letter of 2 November 2000 reads as follows:

"It is noted with concern that you have again failed to timeously meet the instalment due 1 November 2000 (*sic*).

You are therefore again put on notice that should you fail to meet this instalment, due process as provided for by the agreement will take effect."

Certainly the seller's concern was put in a manner that left the purchasers in no doubt as to what the letter was all about. It refers to the appellants' failure to pay the instalment timeously. The respondent went on to state that he was putting the appellants on "notice". The letter is not ambiguous, as the appellants suggest. The use of the word "again" simply refers to the previous failure to pay in time by the appellants.

The appellants also raised the point that the period of notice was not thirty days as required in the Act. I agree with that. The letter of notice was dated 2 November 2000. The letter of cancellation was written on 2 December 2000. Counting from a day after 2 November 2002, that is, excluding 2 November but including 2 December according to the Interpretation Act [*Chapter 1:01*], s 33, that gives twenty-nine days and not thirty days. On this point the respondent failed to comply with the clear provisions of the Act and the agreement of sale.

However, the applicant approached the court seeking confirmation of the cancellation of the agreement of sale on 13 February 2001, when there was still no payment.

When the appellants received both the notice and the letter of cancellation they never protested about how the respondent was handling the matter.

If there had been any variation of the agreement of sale, they had the opportunity to raise the matter with the respondent but instead, and

according to the first appellant's affidavit, they did not take the respondent seriously.

Correspondence from the respondent shows that at all times he was concerned about getting payment in time. They never replied to this correspondence. I do not see how he could have acted as he did if he had varied the payment terms. If he had done so, even the contents of his letters would have been different.

I must therefore find that there was no variation of the agreement of sale.

A point was raised to the effect that the seller should tell the purchaser in the notice what he intends to do if the purchaser fails to remedy the breach.

In response to this, Mr *Morris*, for the respondent, argued that the seller can always exercise his option after the purchaser has defaulted. It is not necessary for the seller to make his choice at the time of the notice. In any case, the purchaser will always be aware that it is open to the seller to exercise any of the options.

I agree with Mr *Morris'* submissions, save to add that where the seller is clear in his mind which option he intends to exercise he should make this clear to the purchaser.

It is accepted that the period of notice was insufficient. It should have been a full thirty days. The notice should have complied fully with the requirements of the Act.

The failure to comply with this specific requirement of the Act is fatal.

Once the parties signed the agreement, each had certain rights against the other based on the agreement. One of the purchaser's rights was to be given notice of not less than thirty days before cancellation.

Section 11 of the Act provides as follows:

"11. No waiver of any right or benefit conferred by this Act shall be of any force or effect."

On the basis of this section, the purchaser's right to be given not less than thirty days notice cannot be waived. Giving twenty-nine days instead of thirty is not proper compliance as required by the Act.

Accordingly, the appeal succeeds with costs and the following order is made –

1. The purported cancellation of the agreement of sale is set aside.
2. The order issued by the court *a quo* is set aside and the following is substituted –

"The application is dismissed with costs."

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

Masendeke & Partners, appellants' legal practitioners

Atherstone & Cook, respondent's legal practitioners