FALYN INVESTMENTS (PVT) LIMITED
versus
ADOLPH THEMA
and
WINNIE THEMA

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 23 February & 4 May 2023

APPLICATION FOR A DECLARATUR

Mr. D. Penet, for Applicant and
Mr I Mupfiga, for the Respondents

NDLOVU J: This is an application for a Declaratur in terms of ***Section 14*** of the ***High Court Act [Chapter 7:06]***

THE FACTS

The critical facts of this matter are a largely common cause and are as follows:

On 15 October 2020, the parties entered into an Instalment Sale of Land. The land in question is situate in the District of Gwelo, being Lot 2 of Lot 1G MNYANI measuring 112 0001 hectares (*the property*), for US$1 500 000.00. The Applicant (the Purchaser) was to pay to the Respondents (the Sellers) a Deposit amount in the sum of US$800 000.00. It happened that at the time the parties signed the sale agreement of sale this deposit amount had already been paid way back in 2018 by the Applicant to the Respondents. The balance amount in the sum of US$700 000.00 was to be paid as follows:

- US$70 000.00 on or before 31/01/21
- US$70 000.00 on or before 30/04/21
- US$70 000.00 on or before 31/07/21
- US$70 000.00 on or before 31/10/21
- US$70 000.00 on or before 31/01/22

- US$70 000.00 on or before 30/04/22
- US$140 000.00 on or before 30/06/22
- US$140 000.00 on or before 31/10/22

In terms of the contract, the sellers authorized a law firm to effect the transfer of the property to the purchaser before the payment of the purchase price in full. The transfer did not take place, understandably so because at law it could not take place before the payment of the full purchase price. Central to this dispute is ***Clause 4*** of the contract. It reads as follows: -

> *"4. In the event of default on any instalment by the Purchaser the Sellers shall be entitled to the* ***allocated fully serviced stands on the property*** *of an equivalent market value to the balance due and outstanding by the Purchaser as at the date of default"*

The Applicant defaulted in servicing the instalments from 31 January 2021. The property remained undeveloped. The default by the Applicant caused the Respondents to write and serve on the Applicant a Notice of their intention to cancel, the agreement of sale in terms ***of Section 8 (2)*** of the ***Contractual Penalties Act [Chapter 8:04]*** *[the Act]*, advising the Applicant of the breach and the need to remedy it within 30 days of service of the Notice. The Notice is dated 26 May 2022 and was served on 7 July 2022. The Applicant responded to the Notice and sought an indulgence of 21 days to remedy the breach, by letter dated 14 July 2022. The 21 days came and went by and so did the 30 days without the breach being remedied. On 31 August 2022, the Respondents dispatched a Notice of Cancellation of the Agreement of Sale to the Applicant. On 1 September 2022, the Applicant responded requesting that the cancellation be rescinded to pave the way for the Applicant to remedy the beach. Respondents declined and advised the Applicant by email dated 2 September 2022. On 6 September 2022, the Respondents sold the same property to a 3rd party. On 22 September 2022, the Applicant was served with a written copy of the Notice of cancellation.

The Applicant reacted by filing this Application seeking a Declaration that the cancellation of the agreement of sale by the Respondents is null and void as it is not the agreed remedy between the parties in terms of ***Clause 4*** of the agreement in the event of a breach on instalments by the Applicant. The application is vigorously opposed.

POINTS IN LIMINE

The Respondents took a *point in limine* regarding part of the relief sought in particular paragraphs 3-6 of the Draft Order. They contended that the relief sought therein was defective in that it was not supported by any averments in the Applicant's founding affidavit. The Applicant counter-argued saying the *point in limine* taken is devoid of merit in that what is sought in paragraphs 3-6 of the Draft Order flows directly from what is sought in paras 1 and 2. Once the Court is sufficiently moved to grant the relief sought in paras 1 and 2 the rest flows therefrom and does away with the need for the Applicant to come back to court to enforce its success by applying for the relief it is presently seeking in paras 3-6.

Not much energy and resource are needed to resolve this *point in limine.* This court has previously held that a *point in limine* should not be taken for excitement or opportunity for it. It must be a valid point, validly and *bona fide* taken. Above all, it must be a point capable of disposing of the matter and resting the litigation. ***Telecel Zimbabwe (Pvt) Ltd vs POTRAZ & Otrs HH 446/15***. The *point in limine* taken by the Respondents lacks that character and quality. Even if it were to be granted, the litigation will remain alive and well because no misgivings are being raised in respect of the relief sought in paragraphs 1 and 2 of the Draft Order. In any case, this is a Draft Order and the Court is not bound by a Draft Order beyond the purpose for which it is necessary. The Court is at large to paraphrase a Draft Order in a manner that gives effect and meaning to the ultimate Order of Court as long as it does not depart from what in essence the application is all about and what the Applicant desires to be granted. The point *in limine* taken is without merit and is duly dismissed and disposed of.

MERITS

APPLICANT'S ARGUMENTS

The Applicant's case is that there is an extant agreement of sale, made and entered into by and between the parties freely and voluntarily. The position of the law on the sacrosanctity of contracts is beyond reproach. Courts are not there to make contracts for the parties. Courts are there to simply interpret contracts. Where a contract is unequivocal and without ambiguity, the court simply pronounces what the parties would have agreed on. This case is the kind of case where the contract is simple and without ambiguity. Over and above the payment timelines agreed upon by the parties, the parties took specific regard to a particular type of breach and provided for it in

Clause 4 of the contract. ***Clause 4*** is clear on what it says and means. The contractual remedy to the breach in this matter is to lay claim for fully developed stands equivalent to the outstanding balance of US$700 000.00. The express mention of this remedy was to the exclusion of the other remedies. One needs to look no further than ***Clause 4*** of the agreement. Respondents' recourse is only to move for the servicing of the stands.

The Act does not confer a right upon a party to cancel an agreement on the sale of land. The statute in *Section 8,* only regulates how a party clothed with the right to cancel an agreement of sale should exercise that right, in this case, the Respondents are not so clothed.

The Applicant goes further to state that it is aware that an agreement of sale of land can indeed be cancelled notwithstanding the absence of a cancellation clause in an agreement of sale, in terms of the common law, however, that right is not conferred by the Act. One has to properly plead a right to cancel before the procedure provided for in the Act can kick in. Respondents must claim serviced stands as and when they are available.

RESPONDENTS' ARGUMENT

The Applicant by defaulting on the instalments committed a fundamental breach of the agreement between the parties, warranting cancellation of the agreement of sale. The Respondents further argue that, because this was an instalment sale of land concluded after 9 November 1973 it falls squarely within the purview of the Act, whose provisions are automatically included in every contract of this nature without a need for the parties to specifically, provide for them in their contract. In the circumstances, therefore, the invoking of *Section 8* of the Act in effecting the cancellation of the agreement cannot be faulted, by virtue of *Section 3* thereof. It is not true that the Respondents' remedy is confined to a claim for fully serviced stands equivalent to the outstanding instalments and that recourse to cancellation of the agreement in the event of a breach was out steed by ***Clause 4*** of the agreement: By virtue of the provisions of *Section 3* of the Act there are statutory exceptions to the doctrine of privity of contract.

The Respondents also argue that they could not and cannot claim fully serviced stands from the Applicant because the property remained an undeveloped piece of land until the cancellation of the agreement and in any case, no transfer has taken place. The exclusion of the cancellation clause coupled with the inclusion of clauses 3 & 4 of the agreement was unfair, unreasonable and

unjust towards them and was a ploy by the Applicant who drafted the contract to prejudice them of their property in the event of a breach by depriving them of a proper and effective remedy. The Applicant was taking advantage of their advanced age respectively. Their invocation of and reliance on the Act in cancelling the agreement is therefore justified.

With the agreement having been cancelled, the transfer not having taken place and the development of the land not having been effected the Respondents can no longer pursue any remedy stated in the contract. The Applicant is only entitled to a refund of the deposit which refund it was offered on 15 September 2022 and it refused to accept. The application is without merit and should be dismissed.

THE LAW

This application interfaces principles of contract and common law. It is trite that Courts do not make contracts for the parties and neither will a court assist a party evading a provision of a contract it freely and voluntarily made, on the simple basis that the resultant obligation is hard to bear.

> *"The role of the Court is to* ***interpret the contract and uphold the intentions of the parties*** *when they entered into their agreements, provided always that the agreement meets all the elements of a valid contract****."[my emphasis]***
>
> ***Ashanti Goldfields Zimbabwe Limited v Mdala SC 60/17***
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> *"The limited circumstances where a Court will imply a term into a contract at common law relate to (a) terms implied through custom or trade usage (where a particular term is prevalent in trade) (b) tacit terms or terms implied from facts which include the business efficacy test (i.e. would the contract make business sense without it?)* ***and the officious bystander test (i.e. would the parties have been agreed on the_matter had they thought about it?)*** *and (c) terms implied by law in contracts of a defined type".* (my emphasis)
>
> ***Mazibuko vs The Board of Governors, Christian Brothers College and 2 Others SC54/17.***

The three essential requirements of a contract of Sale are: -

1) *Agreement (**consensus ad idem**/meeting of the minds)*
2) *A thing sold (**merx**)*
3) *A price (**pretium**)*

Anything else that goes into an agreement of sale is secondary and/or is a by-product of any or all of the 3 fundamental requirements listed above. A contract of sale, therefore, is simply an exchange of property for a price. Fulfilment of conditions imposed on the contract

operationalizes the contract. Delivery of the merx and payment of the pretium are duties parties have under the contract.

APPLICATION

It admits to no argument that the agreement between the parties was at law an instalment sale of land. In *Section 2* of the Act, an instalment sale of land is defined as:

> *"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.***
> (my emphasis)

It is clear from this definition that ***Clause 3*** of the agreement of sale between the parties was a legal nullity. Transfer of ownership of land in this kind of sale can only take place after full payment by the purchaser.

A Court's duty in such matters is to uphold the ***intentions*** of the parties, when they contracted. In this case, the only reasonable inference that can be drawn from the facts that are a common cause is that the parties intended that after signing the agreement of sale transfer would take place in favour of the Applicant (mistaken of the law as they were in that regard) and the Applicant would make several instalment payments and in the event that the Applicant defaulted in the instalment payments the Respondents would have recourse to fully serviced stands whose value equated to the balance owing. In their minds, the breach could only follow after transfer and in their minds the Applicant would service the land into individual stands timeously and ***Clause 4*** would easily kick in in the event of a breach.

The contract is drawn by the Applicant/Buyer and it does not have a cancellation clause. The Applicant both in its Founding Affidavit and Heads of Argument makes the concession that the Respondents do have the power to cancel the agreement but take issue with their reliance on the Act when their cause of action is the Applicant's failure to service the instalments. The Applicant says the statute does not bestow a right to cancel but operationalizes the cancellation process. Clearly, the Applicant is tripping itself and the distinction it attempts to establish in its reasoning is of no moment in this matter when all the facts and practicalities are considered.

The Act is crafted in a way that protects both the seller and the buyer. The Legislature has decided through this statute to, in a way possible interfere with the freedom to contract by the parties. There is no denying that. One cannot reasonably argue against that. The statute starts by regulating when the transfer will take place. The transfer must take place when payment is fully done, per the statute and not per the parties' agreement. It goes on to determine and define how cancellation must take, step by step. In so doing it protects the buyer and at the same time takes away the parties' rights to decide on that aspect. Nowhere does it oust the seller's or buyer's right to cancel the agreement.

In this case, the Applicant is in breach. The breach is such that it makes it impossible for the Respondents to rely on a clause purporting to provide a remedy for that kind of breach because the land has not yet been developed and there is no undertaking to develop it in the near future from the Applicant. The land by operation of the law in light of the breach by the Applicant cannot be transferred to the Applicant because it has not yet been fully paid for by the purchaser. The Applicant has not made an undertaking to discharge its obligation towards the Respondents in the near future either. The purported remedy is simply impossible to be operationalized.

This Court cannot order a violation of a statute by ordering that Respondents transfer the land in question to the Applicant. The parties are in a situation of impossibility. Had the parties thought about all this, they would not have left ***Clause 4*** worded as is. Insistence on reliance on ***Clause 4*** would violate the rules of natural justice and the law. It would be unfair, unreasonable and unjust. At best it can only unjustly enrich the Applicant. Unjust enrichment is illegal. The Respondents cannot be expected to move for the servicing of the land by a Purchaser who is unable to pay them almost half the purchase price. The parties could not have ***intended*** this stalemate. Had they thought of this, they would not have included ***Clause 4*** or they would have paraphrased it.

> *"It is a fundamental premise of every contract that both parties will duly carry out their respective obligations"*
>
> ***Christie Business Law in Zimbabwe@ pp 106 & 119***

There is a presumption that in every bilateral contract, the common intention is that neither should be entitled to enforce the contract unless he has performed or is ready to perform his own

obligations. Conversely, a party who has caused the other to commit a breach cannot found a claim on the breach.

DISPOSITION

The cancellation of the agreement of sale by the Respondents, in this case, was proper and legally executed.

ORDER

It is, therefore, ordered that the Application be and is hereby dismissed with costs.

NDLOVU J.

04/05/2023