RYDALE RIDGE PARK PRIVATE LIMITED
versus
RUTH MURIDZO NO (herein cited in her capacity as the *executrix dative* of the estate of the late Tererai Terance Muridzo)

HIGH COURT OF ZIMBABWE
NDLOVU J
HARARE, 16 February and 18 May 2022

Application for Rescission of Judgment

Mr *K Gama*, for the applicant
Mr *Halimani*, for the respondent

NDLOVU J: This is an application for rescission of the judgment of CHINAMORA J under HC 5043/20 granted on 11 November 2020.

Salient Facts

The parties entered into an instalment sale of a residential stand situate at Rydale Ridge Park being Stand Number 3047 on 7 September 2018. The purchase price was US$18 500.00 payable on the following terms: US$5 000.00 deposit and US$563.00 per month paid over a period of 24 months beginning on 1 October 2018.

If mathematics is still a trusted science, the last and final instalment would have been on 1 September 2020. Key in the agreement of sale and to these proceedings between the parties are clauses (a) and (b) of the Agreement of Sale which read as follows:

> "(a) Purchaser(s) shall pay the balance of the said property on the 1st of October 2018. Payments shall be made by direct payments to RYDALE RIDGE PARK (PVT) LTD in cash. (My underlining)
> (b) Failure to pay the balance of the purchase price of stand(s) before the expiry date, the seller shall review the purchase price to the current market value. Failure which the seller shall then render the sale null and void. RYDALE RIDGE PARK (Private) Limited shall immediately and automatically have the right to repossess the stand(s) not fully paid for and deal in them as they deem fit."

It is common cause that the purchaser/respondent did not religiously adhere to the terms of paying the instalment due, in that he would skip payment when due in some months, and

would pay some instalments via a Bank transfer into the applicant's Bank account instead of cash to the applicant. The respondent avers that he obtained the banking details of the applicant from the applicant. It is common cause that the applicant would, on each occasion a Bank transfer was done, acknowledge the payment and duly receipt the same. Whatever the reasons behind this accommodation, what remains is that the parties appear to have been at peace with what was going on between them over their contractual relationship.

In August 2019, February and March 2020 the respondent transferred sums of money totaling RTGS$8 996.00 into the applicant's Bank account. The applicant refused to acknowledge and/or receipt these aforesaid payments. It is worthy to note that it was the argument by the respondent that by March 2020 he had fully paid the balance of US$13 500.00 in terms of the law. This position was conveyed to the applicant by the respondent's lawyers by letter dated 23 June 2020. Stung by that letter, the applicant responded by a letter from its own legal practitioners dated 1 July 2020. In that letter applicant's lawyers noted the "controversial" transfers and quickly stated that the transfers were made against the applicant's wishes and contrary to Clause (a) of the agreement of sale which provides that payments be made in cash to applicant. All in all, they stated that the payments were being rejected and tendered to the respondent and called upon the respondent to rectify the breach.

On 30 July 2020, the respondent went to the applicant's offices and tendered cash payment of ZWL$8 996 and the applicant refused to accept the payment. In the meantime, the lawyers continued engaging each other via letters over the legality or otherwise of the payment. On 12 August 2020, the respondent went to the applicant's legal practitioners' offices and tendered payment of ZWL$8 996.00 in cash, the applicant's lawyers refused to accept that payment and demanded payment in US dollars.

This historical trajectory of the business between the parties led to the respondent to issue summons out of this court under case number HC 5043/20 on 11 September 2020 against the applicant for among other things the transfer of the said piece of land into the respondent's name.

HC 5043/20

It is common cause that the summons and declaration were properly served on the applicant on 17 September 2020 by delivery on one Ms Sheila Mkhize, (now late having passed on 21 January 2021). The applicant did not file any appearance to defend leading to the respondent applying for and being granted a default judgment on 11 November 2020 by this

Court. Suffice to mention at this juncture, that applicant became aware of the default judgment on 17 March 2021 from the respondent's lawyers in reaction to summons issued by the applicant against the respondent on 19 October 2020 under case number HC 5975/20 seeking cancellation of the agreement of sale between the parties.

Explanation for the Default

The applicant's explanation for the default is that the summons and declaration having been received by Ms Mkhize who was the applicant's receptionist were not brought to the attention of the applicant's Managers and Directors. The applicant avers that Ms Mkhize either forgot to submit the summons and declaration to management, or misfiled them or colluded with the respondent. At the material time Ms Mkhize was reporting to a new Managing Director who was not reporting for duty daily. The default in entering an appearance to defend was therefore not willful owing to the ignorance of the existence of the summons by its management, so avers the applicant.

May I highlight at this stage that, the founding affidavit for the applicant is deposed to by one Shakemore Chikoko who claims to be the General Manager of the applicant. It is not deposed to by the Managing Director that Ms Mkhize was reporting to at the material time, neither is there a supporting affidavit by that Managing Director.

The applicant has argued that its explanation for the default is reasonable and that there is no way it could not have defended the respondent's action as exemplified by its issuing summons for the cancellation of the sale contract between the parties on 19 October 2020. The applicant argued that lack of knowledge of court processes is a reasonable explanation for a default and that the mere fact of the validity of the service of summons does not render the explanation for the default unreasonable *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995(2) ZLR 400(SC).

The respondent has counter-argued on this point on the following lines. The applicant seems to blow hot and cold in its prosecution of its case especially on the issue of service and default to enter an appearance to defend. This is so, according to the respondent, because the applicant in its Heads of Argument argues that service on Ms Mkhize was not proper service, yet on the Bar (and in the founding affidavit) the validity of the service is not questioned by the applicant. Further, argued the respondent, the applicant has not given an explanation as regards what happened between the service of the summons on Ms Mkhize and the granting of a default judgment. The respondent has asked the court not to accept an evasive and

prevaricating explanation as given by the applicant as they betray a lack of *bona fides* on the applicant's part. Mr *Gama* for the applicant was at pains in trying to reconcile the variance in the argument on this point as appears on the Heads of Argument and his arguments from the Bar.

Prospects of Success

On this aspect, the applicant's argument is straight and clear. To the applicant, the respondent breached the terms of the contract by not paying monthly contrary to the parties' agreement and failing to rectify the breach within 30 days from 7 July 2020 when he was called upon to rectify the breach. To that end the applicant's case for cancellation of the contract enjoys good prospects of success and its defence to respondent's action under HC 5043/20 is *bona fide*. After all a court cannot order specific performance where there is substantial and material breach of the contract by the party seeking enforcement of that contract, so has argued the applicant. *Manengureni* v *Kakomo & Ors* HH 489-20.

To sum it all, Mr *Gama* for the applicant argued that if one tenders payment out of time and not in the agreed manner (in this case in cash) that person can be refused payment.

Mr *Halimani* for the respondent reacted in the following manner. That it is common cause that the respondent paid the amount due and the applicant refused such payment on the basis that such payment did not represent true value. The question then is: Was it wrong for the respondent to pay the balance in the manner he did? Respondent's answer to that is that it was not wrong at all. Respondent further argued that, and this is common cause, no letter of demand or notice of breach was sent to the respondent prior to June 2020, when events leading to this litigation arose. In that regard therefore there was no breach that could entitle the applicant to the defence sought.

An applicant seeking to have a judgment rescinded as is in this case must show the existence of "good and sufficient cause" for the rescission and the court is expected to consider the following:

(a) His explanation for the default
(b) The *bona fides* of the application
(c) The *bona fides* of the applicant's defence on the merits of the case

The court will consider cumulatively these requirements in determining whether or not good and sufficient cause has been shown for rescission of the judgment.

> "Wilful default occurs when a party with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing."

Zimbabwe Banking Corporation Ltd v *Masendeke* (supra).

It is trite that what is stated and is not controverted and cannot be dismissed on account of improbability, should be accepted. In this matter, in the absence of an affidavit from Ms Mkhize and/or of the Managing Director she reported to at the material time and most importantly in the absence of the founding affidavit being put in issue by the respondent, I am unable to find that the applicant's directors were aware of the summons served on Ms Mkhize and deliberately took the risk of not instructing their lawyers to enter appearance to defend.

The respondent has argued that, the basis of the controversy between the parties is the currency used to settle the obligation and nothing more. It is pertinent to note that six (6) payments totaling US$4 504.00 from 7 November 2018 to 9 May 2019 were by way of a Bank transfer and the applicant had no issues with that. When the respondent took ZWL$8 996.00 cash to the applicant it was refused. This was after a transfer of the same amount had been refused and returned to the respondent. When the ZWL$8 996.00 cash was tendered the issue of cancellation was not raised by the applicant. The issue of breach arose on 1 July 2020 long after the respondent had made the Bank transfers in RTGS$ currency amounting to RTGS$8 996.00. The applicant has not denied that when the respondent tendered ZWL$8 996.00 cash at applicant's lawyers they refused to receive it and told him that they wanted US$8 996.00.

Telling is the following extract from an email sent by applicant's lawyers to respondent's on 7 August 2020 at 11:23a.m:

> "We have been instructed to receive US$8 9996.00 cash from your client. ….ZWL$8 996.00 cash is not equivalent to US$8 996.00. For the avoidance of doubt our client has instructed us to accept either US$8 996.00 or local currency equivalent thereto provided payment is in cash an is within the thirty days referred to in the aforesaid notice."

We now know that the Applicant's lawyers 5 days later on 12 August 2020 refused payment of ZWL$8 996.00 *in toto* disregarding the opportunity to rate that amount to US$. Mr *Gama* summarized it all in his oral arguments on behalf of the Applicant when he said that the effect of the respondent's conduct if allowed is that one acquires a US$18 500.00 for a

meagre US$400.00. Clearly it appears that the argument about a breach of the contract is an after thought.

The law is now settled.

Section 22(1)(d) of the Finance (No 2) Act, 2019 states as follows:

> "For accounting and other purposes, all assets and liabilities that were immediately before the effective date, valued and expressed in United States dollars (other than those referred to in s 44C(2) of the Principal Act) shall on and after the effective date be deemed to be values in RTGS dollars at a rate of one -to -one to the United States Dollar."

Section 22(4)(a) of the Finance (No 2) Act, 2019 reads as follows:

> "It is declared for the avoidance of doubt that contractual or financial obligations concluded or incurred before the first effective date, that were valued and expressed in United States dollars (other than assets and liabilities referred to in S 44 C(2) of the Principal Act) shall on the effective date be deemed to be values in RTGs dollars at a rate of one -to- one to the United States dollar."

In casu the contract between the parties was a domestic transaction, expressed in United States dollars before the effective date. The US$8 996.00 was legal obligation or liability whose payment was due. It was in accounting terms an asset in the applicant's books of accounts and a liability in respondent's books or statements of accounts. As such it fell well within the reach and impact of section 22 (1)(d) as read with section 22(4)(a) of the Finance (No 2) Act, 2019. *ZIFA* v *Pickwell & Ors* HH 12/21.

To conclude, in the matter *in casu* the purported notice of a breach and demand to rectify the alleged breach was not given per the provisions of s 8 of the Contractual Penalties Act [*Chapter 8:04*] which govern termination of instalment sales.

I therefore find that the application for rescission of judgment lacks *bona fides* and so is the defence on the merits. The applicant enjoys no prospects of success.

Disposition

IT IS HEREBY ORDERED THAT:

1) The application for rescission of judgment granted under case number HC 5043/20 on 11 November 2020 be and is hereby dismissed.
2) The Applicant shall pay costs of this application.

Gama & Partners, applicant's legal practitioners
Wintertons Legal Practitioners, respondent's legal practitioners