TAKAWIRA FARIKAI ZEMBE
versus
GEORGE L.I. LOCK
and
THE MASTER OF TH EHIGH COURT

HIGH COURT OF ZIMBABWE
MAKARAU J
HARARE 17 July and 21 August 2002

OPPOSED APPLICATION.

Mr *Mtamangira*, for the applicant;
Mrs *Wood*, for the 1st respondent.

MAKARAU J: On 19 October 2001, the applicant filed a court application against the respondents in which he sought an order compelling the first respondent to transfer certain property to him against payment of the balance of the purchase price in the sum of $150 000-00. The application was duly opposed.

The facts giving rise to the dispute between the parties is as follows:
In June 1995, the applicant and one Kingstone Leonard Makoni, entered into a written agreement of sale whereby two pieces of land holding a farm by the somewhat frightening name of “None go By” was sold to the Applicant for the sum of $350 000-00. At the time the agreement of sale was concluded, a deposit in the sum of $200 000-00 had been paid. This fact was recorded in the agreement of sale. It was also recorded in the agreement that at the time of the signing of the agreement, the applicant had taken occupation of the farm. The balance of the purchase price in the sum of $150 000-00 was to be paid on or before 31 December 1996.

The seller of the farm passed away in April 1996. This was before the balance of the purchase price had been paid.

The first respondent was appointed executor dative to the estate on 13 December 2000.

Prior to the appointment of the first respondent as executor in the estate, the applicant, through his legal practitioners, communicated with the son of the late Kingstone Leonard Makoni concerning the payment of the balance of the purchase price for the farm. Various letters were exchanged between the parties' legal practitioners. I shall refer to some of these in detail in due course.

After the first respondent was appointed as executor, more correspondence on the same subject matter was exchanged. In a letter dated 2 July 2001, the first respondent addressed the applicant legal practitioners as follows:

> "Your letter of 11th June 2001 refers.
>
> 1. Your client is in breach of the agreement and has been in breach since 1st January 1997 by virtue of his failure to pay the balance of the purchase price by 31 December 1996 in terms of the agreement of sale.
>
> 2. In terms of clause 7 of the agreement our client is entitled to cancel the agreement and reclaim possession of the two properties and to claim damages for breach.
>
> 3. In our capacity as Executor of the Estate of the late K L Makoni, the agreement of sale is hereby cancelled with immediate effect."

The above letter was followed by another dated 12 July 2001 in which the first respondent turned down the balance of the purchase price tendered by the applicant and made reference to his letter of 2 July 2001 as canceling the agreement of sale between the parties.

The applicants then made contact with the son of the late Kingstone Leonard Makoni and attempted to resolve the dispute. Discussions between the parties did not yield the desired result and the applicant filed the above application.

In my view, the sole issue that falls for determination in this application is whether or not the sale agreement between the parties has been validly cancelled. It is not in dispute that the first respondent as the executor of the estate is bound by the agreement between the applicant and the late Kingstone Leonard Makoni.

It may be pertinent at this stage to deal with a side issue that has been raised by the respondent concerning the role and legal position of the son of the late Kingstone Leonard Makoni in relation to the agreement of the sale. On 5 September 1996, he was appointed heir at customary law to his father's estate. Prior to the first respondent being appointed as executor to the Estate of the late Makoni, he had instructed the first respondent to act a his legal practitioner in an

effort to have the applicant pay the balance of the purchase price for the farm. In the matter before me, he has sworn to an additional opposing affidavit in which he avers that the applicant could have and should have made payment of the balance of the purchase price to him as heir or to his agent to avoid cancellation of the agreement of sale.

Our law puts it beyond doubt that the administration of estates is a matter that is clearly governed by the principles of general law.[1] In terms of general law, it is the executor or the administrator of a deceased's estate who is the legal persona representing the estate and not the heirs nor legatees. Thus, an heir in the position of the son of the late Makoni, in my view could not have discharged any obligations or acted in any way on behalf of the estate notwithstanding his position at customary law as it is the law that the debtor's obligation is not discharged unless he can show that he has made payment to a person recognised by law as competent to receive the payment in discharge of the obligation.[2]

The written sale agreement between the applicant and the late Makoni specifically provided that the balance of the purchase price was to be paid on or before 31 December 1996. That date fell after the date of the death of the seller, but before the date of the appointment of the first respondent as the executor to the estate. Thus, performance of the obligation by the purchaser on the stipulated due date was rendered impossible as there was no legal persona representing the estate.

It has been argued on behalf of the first respondent that the applicant was obliged to pay the balance of the purchase price once he became aware of the appointment of the first respondent. I find merit in this submission as a general proposition at law. In my view, the correct position at law is that the applicant could not make any payment on due date and for the period up to the date of the appointment of the first respondent as executor to the estate as there was no legal persona representing the estate. The fact or issue that was supervening and making his performance of the contract impossible was the absence of a legal persona to whom to make the payment. That legal impediment was removed when

[1] See s4 of the Customary Law and Local Courts Act [Cap 7.05].
[2] Harrismith Board of Executors v Odendaal 1923 AD 530.

the first respondent was appointed. Thus strictly speaking, his obligation to pay the balance of the purchase price in terms of the contract became capable of performance immediately he became aware of the appointment of the first respondent.

However, it is common cause that the first respondent extended the due date for payment. This he did by letter dated 5 June 2001 addressed to the applicant's legal practitioners. The operative part of the said letter reads:

> " If the balance of the purchase price and interest is not paid by 30th June 2001, obviously transfer will not be effected and we will take our client's instructions as to how he wishes to proceed against your client."

In my view, the first respondent did not only extend the due date for payment when he wrote to the applicant's legal practitioners thus on 5 June 2001. He also made time not of the essence for the performance of the obligation by the applicant.

Clause 7 of the agreement of sale between the parties provided that should the purchaser fail to pay the balance of the purchase price on due date, the seller would have the right to cancel the agreement and retake possession of the property. This is a typical cancellation clause that would have entitled the first respondent to cancel the agreement when the applicant failed to make payment on 30 June 2001 without making any further reference to the applicant. The first respondent did not send the letter of 5 June under cloak of the provisions of clause 7 of the written agreement of sale between the parties. He did not seek to incorporate into or restate the provisions of the clause in his letter extending the due date. Thus in my view, the first respondent cannot rely on the provisions of the forfeiture clause in the agreement to argue that the failure by the applicant to perform by 30 June 2001 resulted in the automatic cancellation of the agreement.
It remains in issue to determine whether the letter of 5 June 2001 can be construed a clear and unequivocal notice to cancel the agreement of sale which placed the applicant *in mora* and at the same time gave him notice of cancellation.

Mrs. Wood for the first respondent argued that the words "transfer will not proceed" in the letter conveyed the intention to cancel. I cannot agree. Firstly, the letter of 5 June was one among various other letters that had been exchanged

between the parties concerning the matter of the payment and transfer of the farm. Correspondence had been exchanged from as early as April 2000, on the same subject matter. Against such a background, the contents of the letter of 5 June could be viewed as continuing dialogue between the parties as to how and when transfer was to be effected to the applicant. Further and in any event, it did not spell out that the sale agreement would be cancelled. It simply stated that transfer would not be forthcoming, thereby leaving the door open for further negotiations as to when transfer would be effected.

I am fortified in my view that the letter of 5 June was not a clear and unequivocal notice of cancellation of the agreement of sale by the fact that even the first respondent himself did not make any reference to it when he purportedly cancelled the agreement on 2 July 2000. In his letter of 2 July 2000, he relied on the alleged breach occasioned by the applicant's failure to pay the balance of the purchase price in December 1996. He then refers to clause 7 of the written agreement of sale and concludes by notifying the applicant's legal practitioners of the cancellation of the sale. Thus, the first respondent did not regard the letter of 5 June as placing the applicant in *mora* and giving notice of rescission of the contract.

On the basis of the foregoing, I am satisfied that the agreement of sale between the applicant and the first respondent was not validly cancelled.

Accordingly, I make the following order:

1. The first respondent is hereby ordered to sign all documents necessary to effect transfer of certain piece of land situate in the district of Umtali being the land holding None-Go-By Farm measuring 214,9886 hectares and Subdivision A of Ellavale of Rhyesholm Measuring 122,7707 hectares against tender of payment of the balance of the purchase price in the sum of $150 000-00.

2. The applicant has to make the tender of the balance of the purchase price within 7 days of this order.

3. In the event that the first respondent fails or refuses to sign the necessary papers within 14 days of the tender of the balance of the purchase price, the deputy sheriff is hereby empowered to sign the papers on behalf of the first respondent.

4. The first respondent shall bear the applicant's costs of the main application only.

Mudambanuki & Associates, applicant's legal practitioners.
Coghlan Welsh & Guest, first respondent's legal practitioners.