

Judgment No. HB 100/08
Case No. HC 1791/02
Xref No. HC 2068/03,
Xref No. HC 2177/08,

2794/02, 3724/01

UNITED ASSOCIATES (PRIVATE) LIMITED

VERSUS

ESTATE LATE LEORNARD DABULAMANZI NCUBE

AND

PAULOS SIBANDA N.O

AND

THE REGISTRAR OF DEEDS, BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
CHEDA J

BULAWAYO 2ND JULY 2007 AND 9TH OCTOBER 2008

Mr. S. Chamunorwa for the applicant

Mr M. Munjanja for the second respondent

Judgment

CHEDA J: This is an application for an enforcement of a contract. The facts of this matter which are largely common cause are that applicant and first respondent by second respondent entered into an agreement of sale in respect of Lot 1 of Lot 1 of Galoch, an immovable property situate in district of Umzingwane (hereinafter referred to as “the property”).

The terms of payment of the property were as follows:

1. a deposit of \$50 000-00 to be paid upon signing of the agreement.
2. \$100 000-00 on or before 31 August 2001, and
3. the balance \$150 000-00 on or before 30 September 2001 into Sibusiso Ndlovu Legal Practitioners Trust account.

Applicant made payment of \$80 000-00 to Sibusiso Ndlovu Legal Practitioner's account on the 11 September 2001 which was accompanied by a telegram explaining his inability to pay the full installment by the 31 August 2001. A further payment of \$100 000-00 was made on the 12 November 2001.

On the 15th November 2001 Mr. Wamambo, applicant's representative, went to pay the outstanding balance of \$70 000-00 and the requisite transfer fees, but was handed a notice of cancellation of the agreement.

Applicant's argument is on two points, firstly, whether this was an installment sale agreement which required that second respondent be given a 30 days notice as per the provisions of the Contractual Penalties Act [Chapter 8:04] [hereinafter referred to as "the Act"].

At the time of hearing *Mr. Chamunorwa* argued that I should not entertain second respondent's supplementary affidavit. There is longer any need to consider it now as Mr. Munjanja has since conceded that it was indeed filed in error. Therefore, there is no issue arising therefrom.

Second respondent's argument is that this was not an installment sale as it lacked one of the essential elements being that the transfer must be stated.

The issue which falls for determination is whether or not the agreement in question was or not an installment sale of land.

Section 2 of the Act defines installment sale of land as:

"Installment sale of land" means a contract for the sale of land whereby payment is required to be made:-

- a) in three or more installments
- b) by way of a deposit and two or more installments and ownership of the land is not transferred until payment is completed."

In this agreement there was a requirement of a deposit and payment of two installments.

Mr Munjanja's argument is that, this is not an agreement of sale as no reference to transfer was made. This argument with all due respect is rather misplaced as I do not see how the property could have been purchased without contemplation of a subsequent transfer.

Further section 8(1) of the Act reads:-

"1). No seller under an installment sale of land may, on account of any breach of contract by the purchaser-

- (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
- (b) terminate the contract; or institute any proceedings for damages; unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued, as the case may be.

(2) notice for the purposes of subsection (1) shall-

(a) be given in writing to the purchaser; and advise the purchaser of the breach concerned; and 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 installment sale of the land concerned; or

thirty days;

whichever is the longer period."

This agreement was in my view governed by the Act under discussion. That, being so, it was essential for the respondents to comply with the provisions of subsection 2 of Section 8 of the Act. The notice given was clearly not in compliance with these provisions.

In my view, respondents' attempt to place applicant in *mora* had no force or effect in this case as it was in complete variance with the clear provisions of the Act.

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Applicant's second argument is whether or not first and second respondents should be estopped from canceling the contract.

Applicant performed his part of the contract. First and second respondents have argued that applicant did not pay the full installment on the 31 August 2001. If this was their position they should have put applicant in *mora* before they purported to cancel the agreement as the said agreement fell under the provisions of the Contractual Penalties Act.

Applicant performed his part of the contract and accordingly respondents should also perform theirs.

Applicant accordingly succeeds.

The following order is made:-

- “1 the sale by the first respondent of the property known as Lot 1 of Lot 1 of Galoch situate in the district of Umzingwane to the applicant be and is hereby declared valid.
2. second respondent shall within 48 hours upon service of this order deliver to the conveyancing lawyers, the title deed to the property known as Lot 1 of Lot 1 of Galoch, situate in the District of Umzingwane and thereat sign all the necessary documents and perform all the transfer of the said property into the name of the applicant, failing which the third respondent be and is hereby directed to issue out a duplicate copy of such title deed for the purposes of effecting such transfer,
3. second respondent to pay the costs of this application on the ordinary scale”.

Mabhikwa, Hikwa and Nyathi, applicant's legal practitioners
Munjanja and Associates, second respondent's legal practitioners