

**BERNIE WATSON**

**Versus**

**ANDREA COETZEE**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 16 OCTOBER 2009 AND 5 AUGUST 2010

*J Tshuma*, for the plaintiff (respondent)

*N Mazibuko*, for the defendant (excipient)

Opposed application

**NDOU J:** On or about August 2006 the parties entered into an oral agreement in terms of which the plaintiff sold to defendant a certain dwelling house commonly known as number 56 Burnside Road, Bulawayo for the sum of US\$60 000 payable as follows:

- (a) The sum of US\$30 000,00 to be paid in the Zimbabwean Dollar equivalent; and
- (b) The balance of US\$30 000,00 to be paid in the equivalent of the South African Rand.

It was an implied term that defendant would pay the purchase price within a reasonable time from the date of sale. The defendant paid to plaintiff the following sums of money i.e. Z\$17 500 000,00 and ZAR6 500,00 as follows:

- (a) October 2006 - Z\$2 000 000 [equivalent US\$2 000 at time]
- (b) April 2007 - Z\$5 500 000 [equivalent US\$220 at time]
- (c) October 2007 - Z\$10 000 000 [equivalent US\$50 at time]
- (d) July 2007 - ZAR4 000,00
- (e) September 2007 - ZAR500,00
- (f) November 2007 - ZAR500,00
- (g) January 2008 - ZAR500,00
- (h) March 2008 - ZAR500,00
- (i) May 2008 ZAR500,00

No further payments were made by defendant since May 2008 despite demand. In June 2008 plaintiff cancelled the agreement and informed defendant and demanded that defendant vacates the house. The defendant did not vacate resulting in the institution of summons by plaintiff seeking-

- (a) An order declaring the agreement of sale cancelled or alternatively an order declaring the agreement to be invalid, *void ab initio*;
- (b) The ejectment of the defendant and all those claiming under him;
- (c) Damages in the sum of ZAR4 000 per month calculated from 1 September 2006 to date of judgment together with 10% interest; and
- (d) Costs of suit

This is an exception by the defendant to the plaintiff's particulars of claim on the ground that they disclose no cause of action in law. For the purpose of determining the exception, its basis is the following:

"Submissions in brief

It is submitted that the parties entered into an instalment sale of land, and that if the defendant breached the agreement as alleged by the plaintiff by not paying the balance of the purchase price within a reasonable time, then the plaintiff failed to comply with the Contractual Penalties Act, therefore has no actionable right against the defendant.

Submissions in detail

1. Section 7 of the Contractual Penalties Act, chapter 8:04 states as follows ...
2. In terms of paragraph 3 of the plaintiff's declaration, there is no dispute that an oral agreement for the sale of land was entered into ...
3. From paragraph 5 of the plaintiff's declaration it is clear that payment towards the purchase price was made in more than three instalments.
4. Section 8, sub-section (1) of the Contractual Penalties Act, aforementioned, reads as follows ...
5. ...
6. It is clear that in the present matter, the plaintiff did not give the requisite notice in terms of section 8 of the Contractual Penalties Act, and as such, the plaintiff's purported cancellation of the agreement is null and void, and of no force or effect.
7. See also the case of *Preston vs Charuma Blasting & Earthmoving Services (Pvt) Ltd and Anor* 1999 (2) ZLR 201 (5) especially at page 203 where SANDURA JA stated as follows:

"In the circumstances, before terminating the sale agreement the appellant was obliged to comply with the provisions of subsections (1) and (2) of section 8 of the Act. In terms of those provisions, he was obliged to call upon the respondent to pay the instalment within thirty days, and would have been entitled to terminate the agreement only if the respondent failed to pay the instalment within that period."

8. For the foregoing reasons, it is submitted that the plaintiff's action is without merit and it is prayed that it be dismissed with costs and judgment entered in favour of the defendant, declaring the plaintiff's purported cancellation of the agreement between the parties to be invalid and unactionable."

If there was no alternative claim which seeks to have the agreement declared null and void, I would have upheld the exception on the above-mentioned grounds stated by excipient i.e. failure to comply with the provisions of section 8(1) and (2) *supra*.

*In casu*, the alternative claim gives the matter an entirely different complexion. In the alternative claim the plaintiff, in his declaration, alleges that the alleged agreement of sale does not exist. He pleads as follows.

"The parties' purported agreement of sale is invalid, *void ab initio* and therefore of non effect ..."

For the Contractual Penalties Act to be said to apply, there must be proved at the first instance that there is valid agreement. The plaintiff in its declaration puts to issue the very existence of such an agreement.

Accordingly, the exception as taken by the defendant is wrong and best premature. I dismiss the exception with costs.

*Webb, Low & Barry* for the plaintiff (respondent)

*Calderwood, Bryce Hendrie & Partners* for defendant (excipient)