

**KENNEDY GWAMURE**

**Versus**

**DINGANI TSHUMA**

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 14 SEPTEMBER 2009, 26 NOVEMBER 2010 & 26 JANUARY 2012

*C.P. Moyo*, for applicant

*R. Ndlovu*, for respondent

Opposed Application

**NDOU J:** The applicant seeks an order in the following terms –

“It is ordered that:-

- a) Respondent be and is hereby ordered to transfer stand number 12483 Pumula South, Bulawayo in applicant’s name and hand over the title deeds to him.
- b) In the event that respondent, for whatever reason, fails or neglect to act in terms of para (a) within 14 days of this order above, the Deputy Sheriff be and is hereby ordered and authorized to act in the place and stead of respondent in order to effect transfer of the said property into applicant’s name.
- c) Respondent be and is hereby ordered to pay the costs of this application.”

The salient facts of the matter are the following. The applicant and the respondent entered into a written agreement where the respondent sold stand number 12483 Pumula South on 14 February 2003 to the applicant. The purchase price was Z\$4 500 000,00 which was supposed to be paid through Overhead Accord Property Consultants. The following appears in clauses 3 and 5 of the agreement –

“3. MODE OF PAYMENT

- a. The Purchase shall pay to the Seller the sum of \$3 000 000,00 (Three million dollars) to Overhead Accord Property Consultants Trust account as deposit.
- b. The balance of \$1 500 000,00 will be paid on or before the 28<sup>th</sup> of February 2003.

4. THE PROPERTY ...

5. GENERAL CONDITIONS

- a. ...
- b. the right of either party shall not be in any way affected by an extension or indulgence or concession which one party may grant to the other in respect of the performance or either party's obligations."

Further, clause 10 provides -

"10. BREACH

- a) If the Purchaser fails to pay the purchase price the seller has legal right to cancel this agreement and enforce any other right the Seller may have at law."

There was no provision for giving any notice of intention to cancel the agreement.

On 2 May 2003, respondent wrote a note purporting to cancel the agreement of sale between the parties. The note was served on the agent who was handling the sale agreement. The applicant submitted that the provisions of section 8(1) of the Contractual Penalties Act [Chapter 8:04] ("the Act") applies to this case. I do not agree. The agreement does not require payment to be made "in three or more instalments; or by way of a deposit and two or more instalments ...". All that this agreement requires is a deposit of \$3 000 000,00 and balance of \$1 500 000,00 to be paid on or before 28 February 2003. It therefore does not meet the requirements of an instalment sale of land as defined in section 2 of the Act. In any event, the applicant made payment by a deposit and one instalment. Further, the agreement does not provide that the property would only be transferred to the respondent after the purchase price had been paid in full. This is also a requirement in terms of section 2, *supra* - *Preston v Charuma Blasting & Earthmoving Svcs & Anor* 1999 (2) ZLR 201 (S) at 203E-G.

I now propose to consider whether the "Withdrawal Note" dated 2 May 2003 constitutes a proper notice of cancellation of the agreement between the parties. The note reads -

**"RE: WITHDRAWAL NOTE**

I, Dingani Tshuma, I.D. No. 29-174335 H 29 am terminating the agreement of sale of my property number 12483 Pumula South with immediate effect. This was between T Gwamure and me and have no further involvement with the Overhead Accord Property Consultants, from this date on.

(Signed)  
Dingani Tshuma

Witness: Maxwell Tshuma”

It is clear from the respondent’s opposing affidavit that the said agents Overhead Accord Property Consultants were acting on his behalf and not the applicant. This is evinced by his averment in paragraph 3, wherein he concedes that they were “instructed by my girlfriend Suzan Dube.”

On the notice of cancellation it is trite that it must be clear and unequivocal and takes effect from the time it is communicated to the other party – R H Christie, *Law of Contract in South Africa* 3<sup>rd</sup> Ed at 397, *du Plessis v Government of the Republic of Namibia* 1995 (1) SA 603 (NH) at 605E and *Zimbabwe Express Svcs (Pvt) Ltd v Nuanesti Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S) at 330. A notice of intention to cancel must be such that the other party is or ought to be aware of its nature, but it is not necessary to use the word “cancellation”. The intention to cancel may be made sufficiently clear in other ways. The fundamental flaw in the notice of cancellation in this case is that it was not communicated to the applicant. Instead, the respondent communicated it to his own agent who apparently did not communicate it to the applicant as evinced by the fact that the agent received the outstanding balance on 18 August 2003. In any event, the termination of mandate given to the agent was not communicated to the applicant by the respondent. At the end of the day the applicant was not given notice of the intended termination of the agreement.

Finally, the contract was not lawfully terminated. The applicant paid the purchase price in full to the respondent’s agent as provided for in the written contract. Applicant is entitled to the order sought. This kind of order is at my discretion – *Farmers Co-operative Society v Berry* 1912 AD 343 at 350; *Benson v South Africa Mutual Assurance Society* 1986 (1) SA 776 (A) at 783C-D and *Zimbabwe Expresses Svcs* – case, *supra*, at 332G-D 333D. On the issue that the respondent was forced by his girlfriend and her father to sell the house there is also no merit. The respondent does not allege that applicant in any manner forced him into the agreement, or that applicant acted in any manner that could cause the contract to be said to be void or voidable. He does not allege that applicant was acting in collusion with the people who respondent claims put him under pressure. The applicant is an innocent third party who entered into the contract with respondent and the contract is effective. The respondent did not take this court into his confidence and divulge the so-called pressure on him. In the absence of lawful termination of the agreement the contract has to be enforced.

Accordingly, it is order that:-

- 1) The respondent be and is hereby ordered to transfer stand number 12483 Pumula South, Bulawayo into applicant's names and hand over the title deed to him.
- 2) In the event the respondent fails to comply with paragraph (1), supra, the Deputy Sheriff, Bulawayo be and is hereby directed and authorized to act in the place and stead of the respondent in order to effect transfer of the said property into applicant's name.
- 3) The respondent shall bear costs of this application on the ordinary scale.

*Messrs Moyo & Nyoni*, applicant's legal practitioners  
*R. Ndlovu & Co*, respondent's legal practitioners