TONDERAI HAMANDISHE
and
GAMUCHIRAI GLADYS SANGARE
versus
MAFFACK PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
MTSHIYA J
Harare, 4 May 2010 & 21 July 2010

Mr *Mufadza,* for the applicant
Mr *Kawonde,* for the first respondent

MTSHIYA J: This is an opposed application wherein the applicant seeks the following relief:

"1. The purported cancellation of the agreement of sale dated 17th October 2006 between the applicants and the respondents be and is hereby set aside.
2. The respondent be and is hereby ordered to forthwith transfer the undivided share in a certain piece of land situate in the district of Salisbury being land share number 13 of stand number 195 Monavale Cluster Homes, also known as subdivision A, portion 0f Mayfield Estate to the applicants upon respondent satisfying the minimum service requirements set out in its development permit.
3. The respondent shall bear costs of suit on a legal practitioner/client scale."

It is common cause that on 17 October 2006 the parties entered into an agreement of sale. The respondent sold to the applicants its property known as an undivided share in a certain piece of land situate in district of Salisbury being land share number 13 of stand number 195 Monavale Cluster Homes also known as Subdivision A, Portion of Meyfield Estate measuring 704 square metres (the property). The price for the property was $4 928 000.00 (old Zimbabwean currency) and the agreed mode of payment of the purchase price was:

" Deposit of $3 000 000 payable upon signing this agreement of sale of which an amount of $2 630 4000 is payable to Bvekwa Legal Practice and an amount of $369 600 is payable to Maffack Properties representing 7.5% of the purchase price. The balance to be paid over 3 months in three (3) equal instalments. Any delays will attract an interest of 300% per annum."

It is not in dispute that by 31 January 2007 the applicants had fully paid the agreed purchase price. However, on 27 February 2008 the respondent's legal practitioners addressed that following letter to the first applicant:

"WITHOUT PREJUDICE"

Dear Sir/Madam

RE: PROPERTY: SHARE NO. 13 OF SUBDIVISION A, PORTION OF MAYFIELD ESTATE (MONAVALE CLUSTER HOMES): VARIATION OF AGREEMENT OF SALE

Our client has instructed us to communicate to you regarding the above issue as follows:

As you maybe aware, the construction works at the Monavale Cluster Homes site has come to a halt. This has been caused by an order given by the Environmental Management Authority to stop the works pending the production of an Environmental Impact Assessment Report. This has since been complied with. However in the interval, inflation has eroded the value of the amounts paid thus far. This has made it impossible for the further works to continue. Without the completion of the works, it is not possible for our client to transfer ownership of the property sold to you.

In these circumstance, our client makes the following without prejudice offer to you. It is that you enter into a variation of the agreement of sale entered into between yourselves and our client. In terms thereof, you would agree to an increase in the amount needed to complete the servicing works. This amount is in the sum of $36 billion dollars. This amount would be payable by the end of March 2008. In return our client would begin a programme to complete servicing the property. This programme shall be completed within 90 days reckoned from the 1st of April 2008.

The alternative to the above is the cancellation of the agreement of sale. You would be refunded 60% of the current market value of the property the subject of the agreement of sale, minus administrative expenses so far incurred e.g. agents commission and administration fees. The amount in question would be paid within a reasonable time of your acceptance of cancellation.

We have been requested to furnish you with up to 31st of March 2008 to signify your election. This may be done by delivering in writing your response at our offices.

Should you fail to make an election or reject the above proposals, be advised that our client shall apply to court for an order of cancellation of the agreements entered into on the amount of the purchase price paid in the manner the court may deem fit.

We await your consideration.

Yours faithfully

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Kawonde and Company"

On I July 2009 the applicants' Legal Practitioners respondent to the above letter as follows:-

"Dear Sir

RE: PROPERTY: SHARE NO 13 SUBDIVISION & PORTION OF MAYFIELD ESTATE (OUR CLIENT MR & MRS HAMANDISHE)

The above two are our clients who, from instructions purchased the above property from yours. We have been shown the agreement of sale between the concerned parties together with your minute to our clients dated 27th February 2008.
In the context of your said minute we felt that there may be need for us to get some clarifications viz issues raised therein.

a) Is it your client's attitude that the delay in the completion of the project was occasioned by ours and if so, bow?
b) At what stage of development has the project reached and what are the minimum stages required before the properties may be transferred to the individual purchasers.
c) On what grounds does your client believe that in the event of cancellation of the agreement ours can only get 60% of the paid purchase price?
d) What guarantees are there that in the event of our client paying and the others refusing to do so, the project will still be completed within ninety days as suggested in your minute?

You will possibly appreciate the assistive extent of your client's responses to the above and more importantly how such responses could enable us to cut a seemingly long story short.

We kindly wait to hear from you by return of post.

Yours faithfully

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Mufadza and Associates"

On 8 July 2008 respondents' Legal Practitioners again wrote to the applicants' Legal Practitioners in the following terms:-

"Dear Sir or Madam

RE: OUR CLIENT MAFFACK PROPERTIES (PVT) LTD: YOUR CLIENT MR AND MRS HAMANDISHE : SHARE NO. 13 OF SUBDIVISION 195 A, PORTION OF MAYFIELD ESTATE

We thank you for your letter of 1 July 2008.

We have been instructed to reply as follows:

The delay in the completion of the development was not occasioned by your client. At the time the project stalled, it was 60% complete. Our client believes that it is

just and equitable that your client gets 60%, as the amount reflects the extent of the improvement of the property as of now.

Regrettably, your client declined to accept the offer by ours. Accordingly, the agreement is hereby cancelled. Our client offers to pay to yours the full amount he paid adjusted for inflation using the CPI as at the date of payment, in full and final settlement of all its obligations in respect of the above transaction.

Yours faithfully

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Kawonde & Company"

It is the attitude of the respondent, as emerges from correspondence quoted above, that caused the applicants to file this application on 30 July 2008 seeking the relief indicated on the first page of this judgment.

At the hearing of this matter the applicants abandoned clause 2 of their relief and persisted that they wanted the court to determine the status of the agreement of sale.

Mr *Mufadza*, for the applicants, submitted that the applicants had complied with their obligations arising out of the agreement of sale and as such there was no basis for the agreement to be cancelled. He correctly submitted that the attempted variation of the agreement of sale did not comply with clause 12 thereof which provides as follows:

"12. WHOLE AGREEMENTS

This agreement constitutes the entire contract between the parties hereto otherwise than as may be recorded herein and:-

13.1 No warranty, representation, promise or undertaking has been given or made by either party to the other except as recorded in this Agreement;

13.2 There are no conditions precedents suspending the operation of this Agreement, which is not referred to herein;

13.3 No variation in this Agreement shall be valid unless reduced to writing and signed by or on behalf of the parties hereto." (my own underlining for emphasis).

He also said the parties had categorically stated what was covered by the purchase price through clause 14 which provides as follows:

"14. SPECIAL CONDITIONS

14.1 It is agreed that the amounts so paid shall be used for purposes of servicing the land, administrative expenses, professional fees and any other incidental expenses since the stand is being sold off-plan. For this purpose, the Purchaser has agreed and authorized the release of the money to the seller.

14.2 The purchase price of Z$4 928 000.00 includes the cost of architectural and structural designs.

14.3 The Seller undertakes to complete servicing that is provision of sewer and water reticulation, drainage and surface water management system on or before December, 2006 or any other date thereafter agreed between the parties."

All in all, Mr *Mufadza* submitted, it was the responded who was in breach of the agreement of sale. He said, whilst claiming impossibility of performance due to inflation, the respondent had not taken the route of seeking formal liquidation and thereby protecting the interests of people such as applicants. He therefore urged the court to declare the purported cancellation of the agreement as null and void.

Mr *Kawonde*, for the respondent, submitted that the relief sought (ie declaring the cancellation of the agreement of sale null and void) would not assist the applicants in any way and as such the applicants should have simply withdrawn the application. He said the property in question was not registered in the respondent's name. That aspect would certainly stand in the way of specific performance (i.e. transfer of property to applicants). In any case, he argued in his heads of argument:

> "It is common cause that the respondent had to comply with regulatory conditions after it had commenced infrastructural works in terms of the permit. It is undeniable that hyperinflation gripped Zimbabwe and intensified with each succeeding year. The phenomenon of top ups is now known from school fees to ordinary purchases of goods and services. So notorious has this become that the monetary authorities have in certain cases allowed settlement of obligations in some other currency, say US dollar."

Relying on Willie & Millin's *Mecantile Law SA* 15 ed Mr *Kawonde* quoted from p.69 of the edition as follows:

> "When a contract has become impossible of performance after it has been entered into the position is the same as if it had been impossible from the beginning."

He therefore did not see merit in the relief sought by the applicants and called for the dismissal of the application.

The papers *in casu* clearly confirm that as at 31 January 2007 the applicants had satisfied clause 2 of the agreement of sale as read together with the mode of payment already spelt out on first the page of this judgment. Apart from unilaterally creating new obligations for the applicants, the respondent does not dispute that 27 February 2008, when it sought to vary the agreement of sale, the applicants had long fully discharged their obligations under the said agreement of sale. The purported variation, without the consent

of the applicants who already had complied with the contract, and without court confirmation, was, in my view, clearly in violation of clause 12 of the agreement. The respondent had no basis upon which to justify cancellation of the agreement of sale. The best that the respondent could have done was to seek a legal route for confirmation of its inability to perform due to an intervening impossibility. In its letter of 27 February 2008, the respondent had said:-

> "Should you fail to make an election or reject the above proposals, be advised that our client shall apply to court for an order of cancellation of the agreements entered into on the amount of the purchase price paid in the manner the court may deem fit".

That was never done. The position is simply that the respondent is in breach of the agreement of sale and as a way out now seeks to unilaterally cancel the agreement citing inflation and intervening impossibility. To allow such a move to succeed would certainly destroy the sanctity of contractual relationships. The purported cancellation is in my view, clearly intended to avoid specific performance. However, economic hardships cannot be used as automatic weapons to defeat contracts.

In a similar situation in International Trading (Pvt) Ltd, 1993 (1) ZLR 21 (H) the late ROBINSON J , had this to say:

> "I would wind up by saying that if the right of specific performance is to be shown to have real meaning to businessmen, then the loud and clear message to go out from the courts is "businessmen beware". If you fail to honour your contracts, then don't start crying if because of your failure, the other party comes to court and obtains an order compelling you to perform what you undertook to do under your contract. In other words, businessmen who wrongfully break their contracts must not think they can count on the courts, when the matter eventually comes before them, simply to make an award of damages in money, the value of which has probably fallen drastically compared to its value as the time of breach. Businessmen at fault will therefore, in the absence of good grounds showing why specific performance should not be decreed, find themselves ordered to perform their side of the bargain, no matter how costly that may turn out to be for them..."

Admittedly the above sentiments were echoed specifically in relation to the issue of specific performance. However, I am here quoting same because the respondent's action (ie unilateral cancellation of the agreement of sale) is clearly intended to avoid specific performance. The applicant *in casu* seeks a declaration which is meant to save the agreement of sale. The applicants can only proceed to demand specific performance if the purported cancellation is declared null and void. That explains the applicants' position in abandoning clause 2 of the original relief sought.

I have in this judgment made a finding that the applicants complied with the terms of the agreement and were therefore not in breach, if anything the respondent was in breach of the agreement. The applicants are therefore saying there is no justification on the part of the respondent to run away from the agreement and that any variation of the agreement can only be effected in terms clause 12 of the agreement of sale. I am unable to fault applicants' reasoning and therefore I find merit in their application. I therefore find it proper to grant the relief sought .

I accordingly order as follows:-

It is ordered that:

1. The purported cancellation of the agreement of sale dated 17 October 2006 between the applicants and the respondent be and is hereby declared null and void; and
2. The respondent shall pay costs of suit.

Messrs Mufadza & Associates, applicants' legal practitioners
Messrs Kawonde & Company, respondent's legal practitioners