NENYASHA HOUSING CO-OPERATIVE
versus
SIBANDA VIOLINE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 13 May 2019 & 3 July 2019

Opposed Matter

S. Gutsa, for the applicant
R.E. Nyamayemombe, for the respondent

DUBE J: The applicant brought an application for confirmation of cancellation of an agreement of sale it entered into with the respondent and ancillary relief.

The applicant's claim is based on the following brief facts. The applicant is a Cooperative Society registered in terms of the Cooperative Societies Act [*Chapter 24: 05*]. It owns Lot 1 of subdivision A of Merwede of Glaudina of Subdivision A of Gillingham. Sometime in 2012, the applicant acquired the land which it got permission to subdivide into several pieces of land. It put some of the stands on the market. The respondent purchased a commercial stand being stand 1072 Merwede Township of lot 1 of subdivision A of Merwede of Glaudina of subdivision A of Gillingham from the applicant on 28 August 2013 for US $20 000.00 payable in 30 instalments of not less than US$667.00 effective 28 September 2013. The final instalment was due on 7 January 2016. The respondent's payment of the instalments was intermittent and erratic. The respondent only paid US$1700.00 in instalments for the entire 30 month period to 7 January 2016 being the agreed date of full payment and expiration of the credit facility between the parties. The applicant instituted proceedings under HC 9789/17 which it later withdrew after the respondent made indications that she still wanted to be bound by the agreement and had challenged the failure to give her notice to remedy , rectify or discontinue the breach. Notwithstanding the election to stand with the agreement, the respondent continued in her breach. By 12 January 2018 the respondent had paid only US$3 333.00 as a deposit into the applicant's account. Applicant placed the respondent who was in occupation of the stand on three months' written notice to remedy the

breach. The notice dated 12 January 2018 was served on the respondent on 8 February 2018. The respondent failed to remedy the breach and the agreement was cancelled as per the notice. Applicant avers that the respondent lost her right to the stand. It seeks an order for confirmation of the cancellation of the sale agreement concluded between the parties, an order for ejectment of respondent from the premises, that she removes a perimeter wall and structure she erected on the stand which was erected without the authority of the applicant. The applicant seeks an order to be authorised to withhold from the amount paid by the respondent the sum equivalent to thirty percent of instalments payable as cancellation fees.

The respondent opposed the application. She submitted that the notice to remedy the breach given by the applicant is invalid. She argued that the application does not comply with s 8 of the Contractual Penalties Act [*Chapter 8: 04*], [hereinafter referred to as the Act], which requires that applicant should have given respondent notice to remedy the alleged breach and its intention to terminate the contract of sale of the land and serve it personally on her. She maintained that she did not receive the notice to remedy the breach and is not aware of it. She asserts that she only got to know of the notice to remedy the breach through this application. She submitted further that at the time that the notice was allegedly served on her, there was a pending case between the parties .She argued that the applicant did not comply with the requirements of the Act with regard cancellation of the instalment sale agreement and that therefore it is premature to seek to evict her and the notice of cancellation is invalid.

She took issue with the fact that the applicant would purport to have served the notice on her personally when applicant knew that she was represented by legal practitioners and argued that applicant ought to have served her legal practitioners instead of sending the notice to remedy the breach through courier service at her residential address. Respondent challenges the relief sought on the basis that she has made several useful improvements which have increased the value of the property. She asserted that it would be an injustice if she were to be deprived of a property on which she has expended substantial resources. She contended further that there is no basis for seeking the imposition of thirty percent cancellation fee when in fact the applicant is the cause of the purported cancellation.

In terms of clause 6.1 of the agreement of sale, the buyer reserves the right to cancel the agreement of sale if the buyer misses three consecutive monthly payments. A default in payment of instalments constitutes a material breach entitling the settler to cancel the sale. The respondent failed to comply with a material term of the agreement of sale by making irregular and disparate payments towards the purchase price. She paid only US$ 1700.00 for

an entire thirty month period entitling the seller to cancel the agreement. The breach relates to an important and material term of the agreement entitling the seller to cancel the agreement of sale. It was never a part of the agreement that payment of instalments would be subject to the applicant servicing the land. At the hearing of the matter the respondent's representative conceded that the respondent breached the agreement of sale. The concession by the respondent is proper in the circumstances.

The central issue for resolution is whether the sale agreement was validly cancelled. An instalment sale is defined as a sale agreement which requires that payment of the purchase price be made in three or more instalments at by way of deposit and two or more instalments with transfer of the property which is subject of the sale being transferred after full payment of the purchase price, see *Zimbabwe Reinsurance Company* v *Musarurwa* HH 141/2001. The agreement of sale entered into between the parties is an instalment sale. Section 8 of the Act reads as follows,

> "8 **Restriction of sellers' rights**
> (1) No seller under an instalment 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
> (c) 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
> (b) advise the purchaser of the breach concerned; and
> (c) 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 instalment sale of the land concerned; or
> (ii) thirty days;
> whichever is the longer period.''

Section 8 applies to instalment sales of land. Section 8(1) (a) and (b) as read with s 8(2) of the Act stipulates that no seller of land sold by way of an instalment sale may on account of any breach of contract by the purchaser, terminate the sale, institute proceedings for damages or enforce a penalty stipulation or a provision for the accelerated payment of the purchase price unless he gives the purchaser notice to rectify, discontinue or remedy the breach and the period of the notice has expired without the breach being remedied. The notice to must be in writing as stipulated in s 8 (2) (a) of the Act. The procedure to be followed by the seller entails him giving notice to rectify, discontinue or remedy the breach, followed by

the institution of proceedings. The mischief behind this provision is to offer protection to purchasers in instalment sales. Where a purchaser in an instalment sale is in breach of the terms of the agreement, he is afforded an opportunity to rectify, discontinue or remedy the breach before proceedings for cancellation of the instalment sale are commenced. Where he is in breach and is able to remedy the breach within the time specified in the notice, the need to cancel the sale falls away. Failure to give a purchaser notice to rectify, discontinue or remedy the breach renders the proceedings for cancellation of the contract a nullity. There is no bar to a seller who has initiated proceedings for cancellation of an instalment sale without giving the purchaser a notice to rectify, discontinue or remedy the breach withdrawing such proceedings and adopting the correct procedure of issuing the notice first followed by proceedings for cancellation of the instalment sale.

The respondent submitted that the notice of cancellation is invalid because there was a pending matter between the parties at the time that the notice was issued. The applicant instituted proceedings under HC 9789/17 for termination of the agreement on 19 October 2017. Despite a willingness to continue being bound by the agreement the respondent continued in breach. The applicant withdrew the application on 20 March 2918. The respondent continued breaching the contract resulting in the applicant exercising its right to cancel the agreement and placed her on three months written notice to remedy the breach dated 12 January 2018. Proceedings filed under HC 7989/17 were filed in violation of S8 of the Act for failure to place the respondent *in mora*. The notice to remedy the breach was served on 24 February 2018 and the current proceedings were filed on 14 June 2018, well after the three months prescribed in terms of s 8 had elapsed without the respondent remedying the breach. What is important is to show that the application pursed by applicant was filed after a notice to remedy the breach had been served on the respondent and she had failed to remedy the breach. The notice to remedy the breach was not prematurely issued.

The applicant maintained that the notice to remedy the breach was delivered on the respondent personally. In a supplementary affidavit the respondent stated that she had done a due diligence check to establish whether FedEx had delivered the notice of cancellation and established that the notice was never delivered. The papers produced by the applicant disclose that the notice to remedy the breach was indeed delivered personally on respondent. Mr Chiringa, the branch manager from FedEx Express Zimbabwe explained in a letter that initial investigations had revealed that the notice was not delivered. He signed a letter confirming this position prepared by officers from his office. Investigations later revealed that there is

proof of delivery of the notice to the respondent that came from their system raised on 8 February 2018 and that it is authentic. What they failed to locate is where respondent actually signed on the proof of delivery. If they do not deliver a letter they normally send it back to the sender. If they do not send it back, it means that they delivered it.

The proof of delivery shows that the respondent was served with the notice. The fact that FedEx failed to locate where the respondent signed for the notice does not mean that the respondent was not served with the notice. The fact that they did not send the notice back to the applicant suggests that they served it on the respondent and this fact is supported by the proof of delivery. Although there was initially some confusion regarding the service of the notice to remedy the breach, there is confirmation that she was served personally. The probabilities are that the notice came to the attention of the respondent.

The respondent submitted that delivery through FedEx is not proper delivery of the notice as envisaged under s 8. Section 8 (3) of the Act deals with the manner of service of the notice and stipulates as follows,

> ‘’ (3) Without derogation from section 40 of the Interpretation Act [Chapter 1:01], a notice shall be regarded as having being duly given to the purchaser for the purposes of subsection (1)—
> (a) if it has been delivered to the purchaser personally or to an agent chosen by the purchaser for the purpose of receiving such notices; or
> (b) if it has been posted by registered post to the address chosen by the purchaser for the delivery of correspondence or legal documents relating to the instalment sale of land concerned or, in the absence thereof, to the purchaser’s usual or last known place of residence or business’’

Section 8(3) gives a seller the option to either deliver the notice to the purchaser personally or on his chosen agent, or post it by registered post in terms of s 8 (3)(b). The mode of delivery envisaged by s 8(3) (a) is not stated. It was open to the seller to use any mode of delivery chosen by it for as long as it achieved the intended purpose which is that the notice must reach the intended recipient. The seller was not confined to service by way of registered post.

The notice was delivered personally on respondent at her usual address through FedEx. Delivery effected through courier service suffices as delivery in terms of s 8(3) (a) of the Act. Delivery through FedEx suffices as delivery in terms of s 8(3) (a). I do not agree with the respondent that ‘’delivery’’ as envisaged is limited to posting by registered post.

In terms of s8 (3) (a), notice shall be regarded as having being duly given to the purchaser if it has been delivered to the purchaser personally ,to an agent chosen by the

purchaser or by registered post. There is no bar to service being effected on the purchaser personally even though the seller may be aware that the purchaser is represented by a legal practitioner. Personal service on the purchaser suffices.

The applicant has demonstrated that the procedure required to be followed in accordance with instalment sales followed. The notice to remedy the breach was validly done and served. The respondent failed to remedy the breach and effectively the agreement was cancelled without further notice to her in terms of the agreement of sale. The applicant is entitled to confirmation of cancellation of the agreement of sale. The respondent lost the right to enjoy the property and has lost the right to continue holding onto the property entitling the applicant to evict her. This case is distinguishable from the case of *Saltana Enterprises Pvt Ltd* v *Ngoni Takundwa & Anor* HH 143/17 for the reason that no notice to remedy the breach was served on the purchaser in that case. In this case the notice was validly served on the purchaser.

Section 9 of the Act implores a court dealing with cancellation of a sale, to consider all the circumstances of the case and those listed in the section in assessing the relief to grant. It reads as follows,

''9 **Court may grant relief**

(1) Where upon the cancellation or termination of an instalment sale of land the purchaser is required, in terms of the contract, to forfeit—

(a) the whole or any part of any instalment or deposit which he has paid to the seller; or

(b) any claim for any expenditure he has incurred—

(i) whether with or without the seller's consent, in protecting or preserving the land or in paying rates or taxes relating to the land; or

(ii) with the seller's consent, where the expenditure has enhanced the value of the land;

and it appears to a competent court that such forfeiture is out of proportion to the prejudice suffered by the seller, the court may grant such relief as it considers will be fair and just to the parties.

(2)……………

''(3) In assessing any relief that may be given in terms of this section, the court shall have regard to all the circumstances of the case and in particular to—

(a) the amount of any instalments or deposit paid by the purchaser; and

(b) any expenditure referred to in paragraph (b) of subsection (1) which has been incurred by the purchaser in respect of the land concerned; and

(c) the nature of any breach of contract on the part of the purchaser and the circumstances in which it was committed; and

(d) the extent to which the purchaser has complied with his obligations during the currency of the instalment sale of land concerned;

and shall balance those amounts against the value of any use or occupation of the land concerned which was enjoyed by the purchaser, together with any commission or costs which the seller has been required to pay in connection with the instalment sale of land concerned.''

The applicant seeks an order directing that the respondent remove the perimeter wall and structure she put up. It is trite law that possessors and occupiers of land who improve the property they occupy retain certain rights in respect of the improvements they make. These rights include the right to remove the improvements made if this can be done without causing any damage to the land, see *Bangure* v *Gweru City Council* 1998 (2) ZLR 396, where the court stated as follows,

> "Possessors or occupiers of property who improve the property retain certain rights in respect of the improvements. Thus the improver or planter enjoys *the ius tollendi*. The right, during the currency of occupation of the property, to remove the improvement if this can be done without damage to the earlier state of the property itself. A further right enjoyed by the possessor or occupier who improves property is an entitlement to compensation for the improvements, and even an *ius retentionis* to enforce that claim, is permitted to various classes of possessor or occupier of property." See also D*erby Farm (Pvt) Ltd* v *Stewart Musonza and B Chirunga* HH 82-2007.

The applicant submitted that the respondent put up a perimeter wall and a structure without the authority of the applicant and that it does not require the improvements which can be removed without causing damage to the land. The understanding was that the respondent was buying the stand. Any improvements she made would have been made in the ordinary course of things and would not require the authority of the seller. The agreement is silent on the need for authority to put up improvements from the seller. It appears that the buyer was entitled to put up improvements on the stand. The respondent has a right to compensation for improvements made. Unfortunately, the respondent has not filed a counterclaim for improvements and has therefore not sought compensation for the improvements. The applicant contended that it does not need the improvements. It means that they will have to go. The respondent put up a security wall and some unnamed structures on the land valued at $10 000.00 which value was not contested. The improvements appear to be improvements that can be removed without causing any damage to the land.

Section 9 (1) stipulates that where a seller cancels an instalment sale and the seller is required in terms of the contract to forfeit the whole or any part of any instalment or deposit paid to the seller, the court shall consider all the circumstances of the case. Clause 6. 2 of the agreement of sale permits the seller to levy a fee of 30% of the total monthly subscriptions as cancellation fees. This is what the parties agreed to. The respondent cannot turn around and say that this conduct is usurious. The applicant has shown an entitlement to levy a fee equivalent to 30 % of total monthly subscriptions as cancellation fees. The applicant has shown an entitlement to the order sought.

In the result it is ordered that:

1. Cancellation of the sale agreement concluded between applicant and respondent, dated 28 August 2013, for stand 1072 Merwede Township of Lot 1 Subdivision A of Merwede of Glaudina of Subdivision A of Gillingham, also called Stand 1072, be and is hereby confirmed.
2. Respondent and those claiming occupation through her be and are hereby ordered to vacate stand 1072 above within ten days of this Order, failing which the Sheriff of the High Court be and is hereby authorised to eject the respondent and all those claiming occupation through her from Stand 1072 above.
3. The respondent be and is hereby ordered to remove the perimeter wall and structure she erected on stand 1072 above, without applicant's authority ,within 14 days of service of this order on her, failing which the Sheriff of the High Court be and is hereby authorized to remove same at a cost to the respondent.
4. The applicant be and is hereby authorised to withhold from the amount paid-in by the respondent, the sum equivalent to 30% of instalments payable as cancellation fees.
5. Respondent to pay costs of suit.

Gutsa and Chimunga, applicant's legal practitioners
Muringi and Mugadza, respondent's legal practitioners