GRACE MABODZA AND 15 OTHERS
versus
STEWARD BANK LIMITED
and
REGISTRAR OF DEEDS N.O
and
SHERIFF OF ZIMBABWE N.O

HIGH COURT OF ZIMBAWE
MANYANGADZE J
HARARE, 26 May 2022 & 25 January 2023

Opposed Matter

Mr *B Chidzivu*, for the plaintiffs
Mr *M. Mbuyisa*, for the 1st defendant

MANYANGADZE J: On 28 August 2020, the plaintiffs issued summons against the first defendant. The action arose out of an alleged breach of an agreement of sale of immovable property and mortgage facilities concluded between each of the plaintiffs and the first defendant.

THE CLAIM

In the summons, the plaintiffs pray for an order in the following terms:

" a) The purported termination of mortgage facilities granted to each one of the Plaintiffs by the first defendant and accepted by each one of the plaintiffs separately between September and November 2018, through letters from the first defendant dated 6 June 2020 be and is hereby declared invalid.

b) The purported termination of the agreements of sale in respect of immovable properties described in column 2 entered into by and between the first defendant and each of the plaintiffs separately between September and November 2018 through letters from the first defendant dated 6 June 2020 be and is hereby declared invalid. For the avoidance of doubt the sale and mortgage agreements entered into by and between each one of the plaintiffs separately and the first defendant remain force.

c) That the first defendant disburses funds set in column 3 as per the mortgage facilities entered into by and between each one of the plaintiffs separately and first defendant where it has not done so already within seven (7) days of this order.

d) The first defendant signs all the transfer paper to pass transfer to each of the plaintiffs of the properties mentioned in column 2 within seven (7) days of this order, failing which the

third defendant be and is hereby authorized to sign the transfer papers in place of the first defendant and the second defendant be and is hereby ordered to accept papers so signed.
e) The first defendant bears the costs of suit on an attorney – client scale."

The proceedings progressed up to the pre-trial conference stage, with the parties filing the necessary pleadings. Minutes of a pre-trial conference held on 27 September 2021 show that the matter was referred to the opposed roll for argument as a special case, in terms of rule 52 of the High Court Rules, 2021.

Pursuant to the aforesaid referral, the parties filed their statement of agreed facts and heads of argument. Details of the agreed facts appear on pages 2-5 of the record. The salient features of the agreed facts are that the first defendant is the owner of a certain piece of land in the district of Goromonzi, situated in Ruwa, being a subdivision of Fairview Portion Galway Estate. The land now consists of immovable properties with individual title deeds. Between September and November 2018, the first defendant entered into written agreements of sale with each of the plaintiffs in respect of the immovable properties. It developed and sold 3 bedroomed houses to the plaintiffs.

The first defendant extended mortgage loan facilities which were accepted by the plaintiffs, for the purchase of the housing units.

Sometime in June 2020, the first defendant wrote letters to each of the plaintiffs, terminating the loan facility and sale agreements.

Aggrieved by the contents of the said letters, the plaintiffs alleged breach of both the sale and loan agreements. They instituted the instant proceedings. Details of the property description, mortgage facility and purchase price in respect of each plaintiff are tabulated in the statement of agreed facts and are an integral part thereof. They appear on pages 3-5 of the record.

THE ISSUES

The legal issues arising out of the agreed facts are formulated as follows:

2.1.1 Whether or not the plaintiffs have a cause of action against the first defendant?
2.1.2 Whether or not the first defendant validly cancelled the mortgage facilities granted to each one of the plaintiffs by the first defendant and accepted by each one of the plaintiffs separately.
2.1.3 Whether or not the first defendant validly cancelled the agreements of sale of the properties listed in column 2, and entered into with each of the plaintiffs separately.
2.1.4 Whether or not the first defendant should be ordered to disburse funds in column 3 as per the mortgage facilities entered into by and between each one of the plaintiffs separately and the first defendant where it has not done so already within seven (7) days of this order.

2.1.5 What remedies are available to the plaintiffs? Alternatively whether or not the first defendant should be ordered to pass transfer of the properties mentioned in column 2 to each of the plaintiffs,

2.1.6 Whether or not the first defendant should be ordered to pay costs of suit on an Attorney – client scale."

Cause of action

The plaintiffs aver that their claim against the first defendant is premised on the two agreements they entered into and concluded with the first defendant. These are the agreement of sale and mortgage loan facility.

The plaintiffs point out the fact that pursuant to those agreements, the housing units have been built to completion and certificates of occupation issued. The first defendant has gone further and credited the plaintiff's accounts with the purchase price in terms of the mortgage funding agreement. The plaintiffs particularly highlight this peculiar feature of the agreement in paragraph 4 .1.2.3 of their heads of argument, wherein is stated;

> "4.1.2.3 the first defendant credited the plaintiffs' accounts held with the first defendant and opened at the instance of the first defendant, with the purchase price. The funds were available and disbursed. In this case the first defendant being the seller and the lender was paying itself effectively and one would assume that the selling price was sufficient to meet the cost of improvements leaving the bank with a profit. Therefore the plaintiffs have paid the purchase price in full. It is important to highlight that, the first defendant as the lender credited the plaintiffs' accounts with the loan amounts and it proceeded to debit the plaintiffs' accounts with the purchase price as the seller."

It is against these developments that the first defendant has failed to deliver the housing units to the plaintiffs, or transfer title thereof to the plaintiffs. Given this background as shown in the pleadings, the plaintiffs assert that they have a cause of action against the first defendant.

In countering the plaintiffs' averments, the first defendant insists there is no cause of action against it. In its submissions on this aspect, the first defendant focused on the loan facility extended to the plaintiffs. It contends that it merely availed the plaintiffs a line of credit, which is not a contractually binding commitment to lend money to the plaintiffs.

The first defendant further argues that elevating the loan facility to a contractual obligation is tantamount to creating a contract for the parties. In this regard reference was made to the cases of *Mazibuko v Christian Brothers College Board of Governors & Others* SC 54/ 17, and *Magodora & Others v Care International Zimbabwe* SC 24/14, where the

principle that courts should not rewrite contracts for the parties was underscored. It is noted that the first defendant, under this item i.e whether or not plaintiffs have a cause of action against it, chose to confine itself to one aspect that of the mortgage loan facility. Its submissions on this issue are silent on the other aspect, being the sale agreement. Impliedly, it is conceding the plaintiffs' averment that there is a cause of action in this regard.

The term cause of action has been explained in the case authorities. In *Hodgson v Granger Anor* 1991 (2) ZLR 10 it was described as the entire set of facts which gives rise to an enforceable claim.

In casu, it is my considered view that the facts disclosed in the pleadings, which facts are agreed upon, do constitute a cause of action for the plaintiffs against the first defendant. To begin with, there is the agreement of sale of the immovable properties. Concomitant to that is the funding facility. Certain actions were taken by the plaintiffs, at the behest of the first defendant, towards the fulfilment of the two agreements. The plaintiffs were required to open bank accounts with the first defendant, which they did. The first defendant then took the significant step of depositing money into the plaintiff's accounts. That money constituted the purchase price stipulated in the agreement of sale. It seems to me futile to then turn around and attempt to sever the two agreements, regarding one of them as non – binding. As already indicated, the first defendant put itself in the peculiar position of executing both a sale and funding agreement. There was offer and acceptance of the two agreements. Breach thereof definitely gives rise to a cause of action.

Cancellation of the agreements

The plaintiffs contend that the first defendant was not in any way entitled to cancel the agreement of sale and the mortgage facility. There was no basis for doing so. The plaintiffs point out that the letters cancelling the agreements do not cite any breach of the agreement on the part of the plaintiffs. They highlight the fact that cancellation of a contract is a drastic action. It should be a consequence of material or fundamental breach of the contract. no such breach has been alleged by the first defendant.

The first defendant, on the other hand, stands on its letters of 2 June 2020 as the basis for cancelling the contracts of sale and the loan facilities.

The first defendant further contends, in its heads of argument, that it was experiencing problems in completing the project due to changes in currency. This affected payment to third

party service providers. These factors constituted supervening impossibility, which rendered the first defendant unable to fulfil its contractual obligations.

The letter of 2 June 2020, written to the first plaintiff, is the same as those written to the rest of the plaintiffs. It cites the economic difficulties mentioned above. It then states in paragraph 7, that the first defendant is terminating both the loan facility and the agreement of sale. Paragraph 7 of the letter reads a as follows:

> " The Bank advises that, due to the changed circumstances mentioned above, it is hereby terminating its commitment to provide funding for the purchase price in terms of the mortgage loan facility letter communicated to you on 17 November 2018. The Bank further advises that as a result of the termination of the mortgage facility, the agreement of sale signed on 14 October 2018 based on the Bank's ability to provide funding by way of a mortgage facility is hereby terminated."

Prior to this, on 5 February 2020, the first defendant had written to the plaintiffs, apologising for the delay in implementing the housing project and promising to resolve the hurdles being experienced.

It is significant to note that *by the first defendant's own averment, cancellation of the agreement is not based on breach on the part of the plaintiffs*. The first defendant pleads supervening impossibility as cause for the termination. First defendant seeks to make clause 7:1 of the contract of sale redundant, which provided for breach of contact. It reads:

> "7:1 Notwithstanding anything to the contrary herein contained, in the event of the Purchaser failing to pay any sum owing under this Agreement by the due date, breaching any other term or condition of this agreement such failure or breach not being remedied within Seven (7) days of a written notice to the Purchaser to make such payment and or remedy such breach notwithstanding any previous indulgences or concession given by the Seller to the Purchaser, the Seller shall be entitled to Cancel this Agreement of Sale or sue for specific performance without further notice to the Purchaser"

The first emphasizes, in para 3:6 of its heads of argument, that clause 7:1 of the contract is irrelevant, as termination of the agreements is based on supervening impossibility. It is necessary to recite this paragraph, as it reflects the basis on which the first defendant seeks to avoid the contractual obligations at the heart of the dispute between the parties.

It states:

> "3.6 It is our respectful submission that clause 7:1 is of no relevance to the termination of the agreements based on supervening impossibility. The termination was not based on the breach of any term by the plaintiffs. It is for that reason that it would not have made any sense for the first defendant to give notice the plaintiffs to remedy a breach or pay a sum of money due. The issues contained in the letters of 5 February 2020 and 2 June 2020 are not as a result of any breach by the plaintiff and as such the provisions of clause 7.1 of the agreements would not have applied."

THE LAW

It thus becomes pertinent to determine whether the first defendant can be exempted from liability on the basis of supervening impossibility.

The law on supervening impossibility has been clearly spelt out in the case authorities. The general principle is that impossibility of performance can excuse a party from obligations imposed on it in a contract. The principle is general. It does not apply in all situations. The circumstances of a given case will determine whether or not the general rule applies.

Thus, the facts and circumstances of each case must be carefully appraised, bearing in mind the cardinal principle that parties to a contract are bound by the agreement they have freely and voluntarily concluded. Courts are very slow to relieve parties of their contractual obligations. There must be truly justifiable and compelling reasons for the granting of relief whose effect is to extinguish contractual obligations. The courts therefore examine the nature of the contract, the relationship of the parties, the circumstances of the case and the cause and nature of the impossibility.

In the case of *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe* SC 78/05, at p7 of the cyclostyled judgment, SANDURA JA cited with approval the remarks of BOSHOFF JP in *Bischofberger Van Eyk* 1981 (2) SA (WLD) at 611 B –D:

> " ……. When the court has to decide on the effect of impossibility of performance on a contract the court should first have regard to the general rule that impossibility of performance does in general excuse the performance of a contract, but does not do so in all cases, and must then look to the nature of the contract, the relation of the parties the circumstances of the case and the nature of the impossibility to see whether the general rule ought the particular circumstance of the case to be applied . In this connection regard must be had not only to the nature of the contract, but also to the causes of the impossibility . If the causes were in the contemplation of the parties, they are generally speaking bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished"

SANDURA JA, after citing the above passage, went on to remark;

"Those are the principles that ought to the applied once the existence of the impossibility has been established"

Applying the principles, the learned judge of appeal (*Watergate*) rejected the appellant's argument that its failure repay the loan owed to the respondent was due to the policy imposed by the Reserve Bank of Zimbabwe which limited the amount of foreign

currency it could use to repay the loan, which foreign currency had been earned from the sale of its coffee.

The other argument advanced by Watergate was that by the time the RBZ reversed its policy and allowed companies to use the foreign currency they earned and to pay their foreign currency loans, it (Watergate) had already pledged the whole of its coffee crop to a third party, Zimbabwe Coffee Mill Limited, in return for financial assistance, because the Bank had frozen its overdraft facilities. This argument was again rejected. In rejecting the argument, the Judge stated, at p 9 of the cyclostyled judgment;

" In my view, this is not a valid argument because it simply indicates that Watergate had only itself to blame for its in ability to repay the loan to the Bank in United States Dollars. By pledging its coffee crop to the Coffee Mill, Watergate deliberately put it beyond its power to rapox the loan in United States dollars."

From the above case, it can be seen that fluctuations in the RBZ's foreign currency policy and the financial constraints one party faced did not amount to supervening impossibility relieving it of its obligations under the contact.

In the *National University of Science and Technology* v *National University of Science and Technology Academic Staff and Others* HB 7/06, the court emphasized the importance of fulfilling contractual obligations, CHEDA J stated:

> "The parties are in a contractual relationship and each party has duty to fulfil that contract unless it is impossible to do so"
> *In casu* the applicant's position is that it has been inadequately funded. The question then is, is this reason legally valid enough to excuse it from fulfilling its part of the bargain? The impossibility envisaged in law can either be temporary or final. It is only where the impossibility is final that the other party is exempted or excused from performance, e.g, if the other party required to perfom dies or there has been intervention by a *vis major or actus dei See Peters Flamman & CO…… v Kokstand Municipality 1919 AD 2.* In Wessels The *Law of Contract*, Vol 1 page 773 para 2634, the leaned author states:
>
> " if the impossibility of performance is not final but temporary the obligation may according to the nature of the contract only be suspended and not extinguished."

The learned judge went on to make a finding that the applicant in that case had not proved, on a balance of probabilities that the impossibility of performance was final. He reasoned that it was temporary and could be cured by subsequent budgetary allocations. Having made that finding, the judge highlighted the point that:

> "legal contracts should be performed and should not be breached at the mere convenience of the other party. If the courts allow this, then it means that contracts will never be fulfilled at all."

APPLICATION OF THE LAW

Turning to the instant case, the circumstances can hardly be said to constitute the existence of supervening impossibility. The situation depicted in the statement of agreed facts does not bear this out. The housing units are complete. Certificates of occupation have been granted. Only the provision of ancillary facilities like gas, solar power and wifi, remains outstanding. It is not clear on what basis these facilities can render it impossible to transfer title to the plaintiffs.

On the facts of the matter, the applicant has failed to establish supervening impossibility. If supervening impossibility cannot be upheld, then the whole of the first defendant's case crumbles. This is so because supervening impossibility was at the heart of the first defendant's defence to the plaintiffs' claim. All issues were hinged on a resolution of this question. It having been thus resolved, the plaintiffs' claim must succeed. What they are seeking is not impossible to perform. The plaintiffs aptly sum up the position in the concluding paragraph of their heads of argument, wherein they submit;

> "5.1.1 It is noteworthy that at this stage the plaintiffs are not seeking possession or occupation. All that they are seeking is confirmation that the purported cancellation of the contracts been (sic) the parties is valid and that the first defendant passes transfer of the properties to the plaintiffs.
> 5.1.2 It is submitted that with great respect the first defendant has failed to appreciate the relief being sought by the plaintiffs. The plaintiffs ate not seeking delivery of the completed housing units or vacant possession. They are seeking transfer of the properties they bought. The first defendant has not adverted to any factor or circumstance which stops it from transferring the properties bought and paid for by the plaintiffs. The alleged failure and or refusal by third parties to deliver amenities to the housing units does not in any way affect transfer. It is perfectly competent for the first defendant to transfer vacant land without improvements. As and when the plaintiffs require vacant possession they will take steps to enforce their rights. In the interim they pray for transfer of the properties they bought from the first defendant."

I am fully in agreement with these submissions having, regard to all the facts and circumstances of this matter.

On the question of costs, it is the court's considered view that costs on the higher scale are justified. The first defendant took the drastic action of cancelling contractually binding agreements when it was not alleging breach thereof. It claimed supervening impossibility when the facts pointed to the contrary. It is not necessary to repeat those facts, as they have been set out and analysed already.

Save for the plaintiffs who have withdrawn their respective claims, being the fifteenth, eighteenth and nineteenth plaintiffs, an order will be granted as prayed for.

DISPOSITION

It is accordingly ordered that:

1. The purported termination of the mortgage facilities granted to each one of plaintiffs by the first defendant and accepted by each one of the plaintiffs separately between September and November 2018, through letters from the defendant dated 2 June 2020 be and is hereby declared invalid.
2. The purported termination of the agreements of sale entered into by and between the first defendant and each of the plaintiff's separately between September and November 2018 through letters from the first defendant dated 2 June 2020 be and is hereby declared invalid.
3. That the first defendant disburses funds set in column 3 as per the mortgage facilities entered into by and between each one of the plaintiffs separately and first defendant where it has not done so already within seven (7) days of this order.
4. The first defendant signs all the transfer papers to pass transfer to each of the plaintiffs of the immovable properties it sold to the plaintiffs within seven (7) of this order, failing which the third defendant be authorized to sign the transfer papers in place of the first defendant and the second defendant be and is hereby ordered to accept papers so signed.
5. The first defendant bears the costs of suit on attorney – client scale.

Kantor and Immermon, plaintiffs' Legal Practitioners
Mtetwa and Nyambirai, 1st defendant's Legal Practitioners