

DINESH MANIAL NARAN
v
(1) RONNAH MAFURIRANO (2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, ZIYAMBI JA & MAKONESE AJA
HARARE, MARCH 25, 2013

S Mazibisa, for the appellant

V Majoko, for the first respondent

ZIYAMBI JA: The appellant issued summons in the High Court, Bulawayo, seeking an order declaring the sale agreement concluded between him and the first respondent to be valid and binding on the parties as well as an order compelling the first respondent to transfer, to the appellant, her rights title and interest in stand number 378 Gorebridge Road, Killarney, Bulawayo (hereinafter referred to as “the property”) failing which the Deputy Sheriff be authorized to sign all documents necessary to effect the transfer. In the alternative, the appellant sought a refund in the sum of Z\$1 500 000, 00 plus interest a *tempore morae* from 31 October 2001, compensation in the sum of Z\$2 500 000, 00 for improvements on the property and costs of suit against the first respondent on a legal practitioner and client scale.

The High Court found that the agreement between the parties had been cancelled by the appellant and that the latter was entitled to a refund of the sum of

Z\$1 500 000, 00 as well as compensation for proved improvements. The appellant was ordered to pay the costs of suit. This is an appeal against the judgment of the High Court.

Out of the numerous grounds of appeal (19 in all) forming part of the notice of appeal most of which amounted to no grounds at all in terms of the Rules of the Supreme Court, the determining issue is whether or not the trial court was wrong in its finding that it was the appellant himself who cancelled the agreement.

The facts may be briefly stated as follows. The appellant (“Naran”) and Thokozani Khumalo (“Khumalo”) are business partners. Khumalo was a tenant at the property which is owned by the first respondent. Sometime in 2001 an opportunity arose for the first respondent and her husband (“Mr Mafurirano”) to purchase a farm and a business. They decided to sell the property in order to raise money for that purpose and gave Khumalo the first option to purchase it. Khumalo sought financial assistance from Naran and, shortly thereafter, the Mafuriranos were referred to Naran’s legal practitioner (“Mr Ndlovu”) with whom they agreed on a price of Z\$5.3 million. An agreement of sale was drawn up between Naran and Mrs Mafurirano. Para 1 of the agreement provided as follows:

“PURCHASE PRICE AND PAYMENT

The purchase price payable to the Seller by the Purchaser for the said stand shall be the sum of \$5 300 000-00 (Five million three hundred thousand dollars). A deposit Z\$2 500 000-00 (two million five hundred thousand dollars) shall be paid upon the signing of this Agreement and the balance of Z\$2 800 000-00 (two million eight hundred thousand) shall be paid in monthly instalments of Z\$1 500 000-00 with effect from on or before the 31 October 2001 finishing with the balance of Z\$1 300 000-00. 30% per month interest shall be paid on Z\$2 300 000, 00.”

Mrs Mafurirano signed the agreement on 12 September 2001 and returned it to Mr Ndlovu for signing by Naran who eventually signed on 30 September 2001. No payment of the deposit was made on that date notwithstanding the provision for payment of a deposit upon signature of the agreement. It was not until 26 October 2001 that Naran made a payment of Z\$1 500 000,00.

Numerous efforts by the Mafuriranos to obtain further payment from him met with no success. They consulted Ndlovu, who referred them to Naran. On 7 November 2001, Mr Mafurirano had a meeting with Naran who advised him firstly, that Mr Ndlovu had had no right to enter into the agreement on his behalf, secondly, the house was overpriced and he could get a better house for the same price in Ilanda or Famona and thirdly, that of the Z\$1.5 million which he had paid, \$1.1 million was to be returned and the balance of \$400 000, 00 was to be kept by the Mafuriranos for the inconvenience caused to them. It was Mafurirano's understanding that by making the above utterances to him, Naran had cancelled the agreement. He therefore wrote to Khumalo the following day relating the above and informing Khumalo, *inter alia*, that the Mafuriranos had, in the circumstances, taken a decision not to dispose of the property. No response having been received from Khumalo to the letter, the Mafuriranos instructed their legal practitioners to write to Naran. The letter dated 7 February 2002 read in relevant part, as follows:

"Re: Agreement of sale with Ronnah Marurirano

We refer to the above matter in which we act for Ronnah Mafurirano with whom you entered into a sale agreement in respect of stand 378 Gorebridge Road, Killarney.

The purchase price was in the sum of \$5 300 000, 00 payable as to a deposit of \$2 500 000, 00 and the balance of \$2.8 million in monthly instalments of \$1.5 million starting end of October 2001.

You paid \$1.5 million as a deposit on the 26th October 2001. This was \$1 million less than the agreed deposit.

You have not paid anything further after the \$1 million (sic) referred to.

Our clients instruct us to enquire from you, as we hereby do, whether it is still your intention to proceed with the purchase and, if so when they can expect to receive the balance which is overdue. If you are no longer interested in the purchase please advise to enable our clients to move forward. Please let us have your election either way within 7 days of this letter failing which we will approach court for an order to declare forfeit as a pre-estimate of damages the deposit paid.

Yours faithfully

Majoko and Majoko” (emphasis added)

Still no response having been received, another letter, dated 2 May 2002, was written. It read thus:

“Dear Sir

Re: Agreement of sale with Ronnah Mafurirano

We refer to the above.

In terms of your agreement you were supposed to pay a deposit for the purchase price in the sum of \$2 500 000.00 on the date of your signing the agreement. You failed to do so. In fact you only paid the sum of \$1 100 00.00 (sic).

Through several letters to you our client informed you that time of payment was of the essence. You have failed to make any other payment from the date you made the first instalment. You have breached your contract.

Due to your breach of contract by failing to pay on time and as stipulated in the contract our client now considers your contract cancelled.

Our client also wishes to notify you that he reserves the right to forfeit the instalment paid to her.

Yours faithfully

Majoko and Majoko”

Both letters were addressed to Naran personally but were sent to a wrong address. However, Mr *Ndlovu*, his legal practitioner admitted that they had been received at his office and that, despite his denials, Naran was aware of the letters. Mr *Ndlovu* also

admitted, in his evidence to the court *a quo*, that although Naran was in material breach of the agreement, the Mafuriranos kept on granting extensions up to 2 May 2002 when they caused the letter to be written by their legal practitioners accepting the cancellation of the agreement.

Naran's allegations to the contrary were not accepted by the court *a quo*. His evidence was rejected by that court as being unworthy of belief. The evidence of Naran conflicted with that of his two witnesses (including his legal practitioner) both of whose evidence supported the evidence of Mr Mafurirano.

It was contended on behalf of the appellant that the sale being an instalment sale was unilaterally cancelled by the first respondent in violation of s 8 of the Contractual Penalties Act [*Cap 8:04*] which requires that notice of cancellation should be given to the purchaser by the seller and specifies the manner in which such notice should be given.

The learned Judge however accepted, on the evidence of Mr Mafurirano, as corroborated by Mr Ndlovu, that the agreement was cancelled not by the first respondent but by Naran. This conclusion in our view is amply supported by the evidence. The appeal is therefore devoid of merit.

It is for the above reasons that after hearing counsel, we dismissed the appeal with costs and indicated that our reasons would follow.

CHIDYAUSIKU CJ: I agree

MAKONESE AJA: I agree

Cheda & Partners, appellant's legal practitioners.

Messers Majoko & Majoko, first respondent's legal practitioners