

**NATHAN MADZVANYA**

**And**

**KUDZANAI SIBANDA**

**Versus**

**BERNADETTE MUJURU**

**And**

**REGISTRAR OF DEEDS N.O.**

IN THE HIGH COURT OF ZIMBABWE  
KAMOCHA J  
BULAWAYO 2 JUNE 2010

*T Moyo-Masiye* for applicants  
*M Nzarayapenga* for 1<sup>st</sup> respondent  
No appearance for 2<sup>nd</sup> respondent

Opposed Court Application

Ex Tempore

**KAMOCHA J:** During the month of September 2008 the second applicant representing the first applicant entered into a memorandum of an agreement of sale with the first respondent for the sale of a dwelling house known as number 29 Landau Drive or 13 Copley Crescent, Khumalo, Bulawayo.

The purchase price was US\$150 000 payable by the purchaser directly to the seller at Bulawayo free of bank exchange as follows:

1. US\$10 000,00 in cash before the 24<sup>th</sup> of September 2008;
2. US\$ 40 000,00 by way of transfer into the seller's husband account before the 24<sup>th</sup> of September 2008;
3. The balance to be paid in a space of three months in installments of:-
  - (i) US\$34 000,00 to be paid by 31<sup>st</sup> of October 2009;
  - (ii) US\$33 000,00 to be paid by the 28<sup>th</sup> of November 2008;

(iii) US\$33 000,00 to be paid by the 31<sup>st</sup> of December 2008

Clause 13 of the agreement stipulated that should the purchaser fail to make payment on due date of any amount as provided in clause 1 of the agreement of sale or commit any breach of the terms and conditions thereof, then upon giving seven days written notice, the seller shall, at her option, have the right to sue for the full balance of the purchase price outstanding, including interest at prevailing Barclays Bank UK overdraft – lending rates and collection charges of 10% or alternatively to cancel the agreement of sale and resume possession of the said property and sue the purchaser for any damages she may have suffered as a result thereof and 15% of any payments made by the purchaser to the seller shall be retained by the seller as *errah* or *rouwkoop*.

The purchaser failed to meet his obligations as agreed by the parties. The parties ended up agreeing that it would not be possible for the agreement of sale to be consummated. That was entirely due to the fault of the purchaser. The buyer had paid US\$80 649,28 towards the purchase price at that time. When the seller sought to invoke the provisions of clause 13 of the agreement of sale above the applicants launched this application seeking the following order:-

“It is ordered that:-

- (1) it and is hereby declared that no penalty shall be chargeable upon the applicants by the 1<sup>st</sup> respondent consequent to clause 13 of the agreement of the parties signed on the 19<sup>th</sup> September 2008; and
- (2) judgment be and is hereby granted against 1<sup>st</sup> respondent and in favour of the applicants in the sum of US\$80 649,28 together with interest at the prescribed rate from the date of judgment as well as cost of suit.”

The first respondent vehemently opposed the application and counter claimed thus:

“It is hereby ordered that:-

- (1) it be and is hereby declared that the applicants and 1<sup>st</sup> respondent entered into an agreement of sale for stand 6813 Bulawayo Township for the sum of US\$150 000,00;
- (2) it be and is hereby declared that pursuant to that agreement of sale the applicants have paid US\$80 649,28;
- (3) that the agreement of sale is cancelled; and
- (4) that the applicants be and are hereby ordered to pay the 1<sup>st</sup> respondent a penalty on account of breach of the agreement.”

As alluded to earlier in this judgment, it was entirely the fault of the applicants that the agreement of sale collapsed. They were unable to proffer acceptable reasons why the penalty stipulation should not be enforced. In an attempt to do so they had alleged that the 1<sup>st</sup> respondent had cancelled the agreement without tendering refund of payments made towards the purchase price. That of course, was not true. Further, the applicants had argued that they had not committed any breach and that they had not committed any breach and that shortfall in the installments payments they had made were due to exchange rate fluctuations between the British pound and the United States dollar. That assertion was also untrue. The applicants were expected to have paid, for instance, a total sum of US\$66 000,00 but they only paid a paltry sum of US\$3 723,65. No exchange rate could result in such a gross disparity in installments.

The Contractual Penalties Act [Chapter 8:04] permits the enforcement of a penalty stipulation. Section 4(1) provides that a penalty stipulation shall be enforceable in any competent court. The 1<sup>st</sup> respondent is entitled to enforce the penalty stipulation in this court since the court could not find any acceptable explanation why that should not be done.

In the result I would issue the following order:-

- (a) The provisional order be and is hereby discharged with costs;
- (b) The applicants' application be and is hereby dismissed with costs; and
- (c) The 1<sup>st</sup> respondents' counter application be and is hereby granted in terms of the draft order on page 3 with costs.

*Hwalima, Moyo & Associates* applicants' legal practitioners  
*Dube-Banda, Nzarayapenga & Partners*, 1<sup>st</sup> respondent's legal practitioners