MAXESS MARKETING (PVT) LTD
versus
SHAILLON CHISWA

HIGH COURT OF ZIMBABWE
TAKUVA J
HARARE;8 October 2024 and 20 March 2025

Court Application for Cancellation of Sale

C Hwara, for the applicant
K Rusike, for the respondent

TAKUVA J: This is a court application for confirmation of cancellation of agreement of sale.

Background facts

The Applicant entered into an agreement of sale for its property called 672 Scanlen Drive Helensvale with the Respondent on the 16th of October 2018. The purchase price of this property was USD 800 000.00 which was to be paid in instalments. The parties agreed that the settlement for the purchase price had to be done by the 3th of August 2019. Respondent however failed to settle the amount by the stipulated timeline and she had only managed to pay the sum of US$ 489 000.00 owing a balance of USD311 000.00. Applicant proceeded to write a letter notifying the Respondent of their breach and gave Respondent a 7-day period to rectify such, failure of which would lead to the cancellation of the contract. The 7-day period was a term that both parties had agreed to in their agreement but it however contravened the Contractual Penalties Act. Accordingly, the Respondents argued the validity of the notice of cancellation through summons and in the same case also sought specific performance from the Applicant under case HC 9336/19. In this summons the Respondent's claim was as follows;

a) Confirmation of the agreement of sale date 16th of October 2018;
b) Transfer of stand 627 Helensvale Township of Subdivision 33, Helensvale, measuring 4655 square metres, and held under deed of transfer Number 3374/04 into Plaintiff's name within14 days of the date of the order and tendering the balance of the purchase price.

c) Should the first Defendant fail to effect such transfer, or refuse to accept the balance of the purchase, the second Defendant be authorised to sign all the necessary documents to enable transfer of same to pass the Plaintiff upon payment of the balance into the Guardian's Fund or with the registrar of the High Court.
d) Cost of suit on a legal practitioner and client scale.

It seems however that the Applicants did not accept this offer for reasons unknown this court and this matter has not yet been finalised.

These events were then followed by the Applicant's rectification of their notice by way of a letter on the 24th of October 2022 granting the Respondents 30 days to settle the balance. This was clearly not done as the Applicant sent another letter on the 9th of December 2022 to the Respondents, now cancelling the said contract due to the failure of the Respondent to pay within the 30 days as demanded in the first letter. According to the Respondents, this cancellation cannot be considered to be valid as the claim to cancel prescribed in 2019 when settlement became due. Applicant on the other hand claim that prescription only arose in 2019 after their rectified notice of cancellation.

The law

In Zimbabwe, the Contractual Penalties Act [*Chapter 8:04*] governs the enforcement of penalty clauses in contracts, particularly focusing on instalment sales of land. Section 8 of the Act stipulates that a seller cannot enforce a penalty clause, accelerate payment, terminate the contract, or seek damages due to a purchaser's breach without first providing a written notice. This notice must detail the nature of the breach and grant the purchaser a minimum of 30 day**s** to remedy the situation. Failure to provide this notice renders any subsequent cancellation or enforcement actions invalid.

Application of the law to the facts and Analysis

In their first attempt to cancel the contract, the Applicants contravened the above-mentioned Act. Despite the parties agreeing to the 7-day notice period between themselves, the Act intervenes in such circumstances whereby a penalty might be considered unreasonable. In the case of *Fichani & Anor* v *Makoni* SC-02-03, the seller issued a notice of breach to the purchaser and, after 29 days, proceeded with a notice of cancellation. The Supreme Court held that the cancellation was invalid, as the Act requires a minimum 30-day notice period for the purchaser to rectify the breach. The court emphasized that strict adherence to the statutory notice period is mandatory for a lawful cancellation.

This is not disputed by the Applicant as he rectified his mistake by granting the Respondents the 30-day grace period through the letter of 24 October 2022. However, one should not ignore the events that took place before this letter. The Respondents in this matter filled summons under case HC 9336/19 of this court. Respondents in this summons merely emphasised the point that the agreement was still at this moment valid and intended to perform their obligation thus tendering the payment of the balance in order to finalise the agreement. It is at this point whereby the court finds itself in in the dark as the Applicant does not state why he refused or did not receive the balance owed to him at this moment. It is clear why there are two orders of this court directing the Applicant not to interfere with the Respondent's occupation of the property at this moment since there is an ongoing case that in my view will deal with the root cause of what I would consider extensions of the main matter that is HC 9336/19.

In the first application (HC9336/19), the court is asked to confirm the agreement of sale and to order the Applicant in this matter to accept the balance as agreed between the parties. On one hand, by for example this court deciding that the contract has not prescribed, the effect of this conclusion will affect one of the issues that the first application intends to deal with i.e. confirming the agreement and ordering specific performance from the Applicant in this matter. On the other hand, if one decides that the contract has prescribed as the Respondent in this case are claiming, there is need to still consider that they are Applicants in active proceedings that they did not withdraw, claiming that the contract is valid and tendering to pay the debt owing. If the Respondents in this case were denying debt, it would have been easier to establish whether the debt has prescribed as it would mean that the first application would ought to be dismissed or withdrawn by the Applicant in that matter. Contrary to that, Respondents still acknowledge the debt and they surely cannot blow hot and cold.

Under s 16 of the Prescription Act**,** once the prescription period has lapsed (commonly 3 years for ordinary debts), the debt is considered extinguished, and the creditor loses the legal right to enforce payment through the courts. However, if a debtor voluntarily acknowledges a prescribed debt, either through written acknowledgment or by making a payment (even partially), the debt can be revived, and the prescription period resets**.** Interruption by Acknowledgment or Payment Section 18(1) of the Act states:

> "The running of prescription shall be interrupted by an express or tacit acknowledgment of liability by the debtor."

Conclusion

In *casu,* the Respondents acknowledges its debt but however only argues the currency in which settlement ought to be made. The contract clearly therefore hasn't prescribed and the way that this debt is settled is a different claim altogether that can be dealt with during or after the finality of the proceeding in HC 9336/19.

Disposition

This application be and is hereby struck off the roll pending the finalisation of case HC 9336/19.

TAKUVA J:…….

Warera and Associates, applicants 'legal practitioners
Zvobgo Attorneys, respondents' legal practioners