THOMPSON NGWENYA FAMILY TRUST
versus
ZIMBABWE AMALGAMATED HOUSING ASSOCIATION

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 27 May 2021 & 30 June 2022

Opposed Court Application

T E Gumbo, for the applicant
T Tanyanyirwa, for the respondent

CHITAPI J: The applicant applies for a declaratur and consequential relief. The draft order filed by the applicant reads as follows:

> **"IT IS ORDERED THAT**:
>
> 1. The purported cancellation of the agreement of sale between the Applicant and the Respondent with respect to ***Stand 13766 Norton Township of Galloway, situate in the District of Hartley measuring in total 2460 square meters*** dated 14 January 2016 be and is hereby declared null and void.
> 2. The Respondent be and is hereby directed to accept the payment of ZWL15 625.00 in compliance with the notice letter dated 9 June 2020 and any subsequent payments in the local currency in settlement of the sale agreement.
> 3. The Respondent shall bear the costs of suit on an attorney and client scale."

The background facts to this application are fairly straight forward although the legal issues which then arise are not equally straight forward in their determination. The parties executed a written instalment sale agreement in terms of which the applicant purchased an immovable property called stand 13766 Norton Township of Galloway from the respondent. The agreement of sale was executed on 14 January, 2016 at Harare. In terms thereof the purchase price was agreed to be US$30 750 payable by way of a deposit of US$12 000 which was acknowledged to have been paid on signature of the agreement and subsequent monthly instalments of US$312.50 to be paid over a period of 60 months commencing on 1 February, 2016. It is common cause that the applicant did not pay the instalments in terms of the agreement thereby falling into arrears. The amount of arrears as at 9 June, 2020 was the sum of US$15 625. This amount of arrears is considered as agreed because it is the amount which was calculated as outstanding and demanded by the respondent. The applicant deposited the said amount in RTGS dollars and claimed that it had brought the payments outstanding up to

date. It was by letter dated 9 June 2020 that the respondent gave 30 days written notice to the applicant in terms of s 8(1) of the Contractual Penalties Act, [*Chapter 8:04*] to remedy the breach of non-payment of outstanding instalments by paying US$15 625.

For purposes of contextualizing the importation of the Contractual Penalties Act, s 8(1) aforesaid is a provision of general application to all sales of land whereby the purchase price is paid by instalments. An instalment sale of land in terms of the Act is a contract where on the purchase price is to be made in three or more instalments or where there is payment of a deposit and the balance is to be paid in two or more instalments. Further, the ownership of the land should be provided to pass after all instalments are paid up. The provisions of the section require that before terminating the contract or instituting proceedings for damages or enforcing a penalty stipulation or a provision for accelerated payment of the purchase price, the seller shall give notice to the purchaser to remedy, rectify or desist from continuing being in breach. The notice period must provide for a minimum of 30 days. However where an agreement gives a longer period of notice then the period so given is the one to be given to the purchaser. If the agreement gives a shorter period then the period of notice shall be not less than 30 days from the date of notification of the breach. The notice period is not subject to waiver by virtue of s 11 of the Act which stipulates so.

The applicant who had been given 30 days to remedy the breach made a deposit of RTGS$15 625 into the account of the respondent on 8 July 2020. The applicant claims that the RTGS payment amounted to the remedy of the breach as stipulated in the letter of notice to remedy breach. The applicant averred that there was disagreement between it and the respondent on this payment. The respondent insisted that the payment ought to be in in United States Dollars. The respondent did not deny that there were engagements entered into between the parties post the RTGS deposit having been made. The applicant averred that it refused to accede to the respondent's demands that payment be made in United States Dollars.

By letter dated 27 August 2020 the respondent's representative Mr Killer Zivhu who is the designated in the correspondence as Director General wrote as follows:

"27 August 2020

Att: Thompson Ngwenya
13766 Galloway
Norton

Dear Sirs

RE: CONFIRMATION OF CANCELLATION OF AGREEMENT OF SALE FOR STAND 13766

The above matter refers.

This letter serves as confirmation of cancellation of the Agreement of Sale entered in the month of 14 January 2016. This follows a notice to rectify breach of the agreement of sale which was dated on the 9th June, 2020 and a newspaper advertisement as required by law.

Yours faithfully

Killer Zivhu
Director General"

The letter of 9 June 2020 referred to as the notice to rectify breach was worded by the respondent as follows:

"09 June, 2020

To: Thompson Ngwenya
13766
Harare

RE: NOTICE TO RECTIFY BREACH OF AGREEMENT STAND 13766

We refer to the above agreement entered into on the 14th day of January, 2016.

We notice that you last made payment of $365 on the 19th April, 2016 and have not made any further payments after that, thereby breaching the said Agreement.

We hereby give you 30 days' notice from the date of receipt of this letter in terms of the Contractual Penalties Act to rectify your breach by paying off all arears in the sum of $15 625 failing of which the Agreement shall automatically be cancelled and we shall repossess the stand.

Yours faithfully

Killer Zivhu
(Director General)"

The applicant upon receipt of the letter of cancellation of the agreement dated 27 August 2020 engaged legal practitioners who in a letter dated 1 September, 2020 to the respondent challenged the alleged cancellation as being invalid because the applicant had remedied the alleged breach as set out by the respondent in its letter dated 9 June, 2020 through payment of the stipulated arrears in full. The applicant gave notice in the letter that unless the respondent withdrew its letter of cancellation of the agreement within seven (7) days of the letter of demand to rectify the alleged breach, the applicant would apply to this court for a declatory order to protect its rights.

The respondent also engaged its legal practitioners who responded to the letter of demand by the applicant's legal practitioners by letter dated 2 September, 2020. The response brought a new dimension to the matter and paper trial. The letter consisted in a complete turnaround from the letters of 9 June 2020 and 27 August 2020. It is well to quote the letter. It is stated therein as follows:

> "2 September 2020
>
> MESSRS CHINAWA LAW CHAMBERS
> Legal Practitioners
> HARARE
>
> Dear Sirs
>
> **RE: CANCELLATION OF AGREEMENT OF SALE STAND 13766, GALLOWAY, NORTON**
>
> We refer to your letter to Zimbabwe Amalgamated Housing Association dated 1st instant. We represent them. Please note out interest.
>
> Please be advised that the agreement of sale between our client and the Thompson Ngwenya Family Trust was cancelled in January 2018 after the Trust failed to rectify a breach of the agreement of sale after being given notice to do so through a letter dated 15 December 2017.
>
> The letter that you have referred to was merely a confirmation of this cancellation after your client had made attendance at ours' office and had been offered the opportunity to enter into a new agreement of sale with new terms as an act of magnanimity on the part of our client.
>
> The payment of $15 625.00 that is made mention of in your correspondence was reversed not because there was a demand of payment in United States Dollars but rather because the agreement of sale had since been cancelled and our client did not want to unjustly enrich itself by accepting an amount which was not owed.
>
> We have also noted the threat of litigation against our client and wish to advise that we have instructions to accept any process with regards to this matter and will defend nay such action with a prayer of costs on a higher scale of attorney client scale.
> Yours Faithfully
>
> **TANYANYIWA GAPARE ATTORNEYS**
> cc: Client (via e-mail)."

In response to the alleged notice to remedy breach and the subsequent cancellation referred to in the above letter as having occurred in December 2017 and January 2018, the applicant denied that it was served with the alleged notice and/or cancellation letter. The respondent attached a copy of the alleged letter of notice to rectify breach dated 15 December 2017. It was addressed to the applicant at 748 Mukonono Street, Nharira, Norton which was

the address of the applicant in terms of the agreement of sale. The respondent also attached a copy of what it called "notice and certificate of posting a registered article". The respondent averred that the notice was sent to the applicants' *domicilium citandi et executandi* as provided in clause 15 of the agreement. Clause 15 provided that the addresses of the parties as given in the agreement constituted their respective *domicilium citandi et executandi*. The agreement did not provide for the manner of service. The respondent claimed to have sent the letter by pre-paid registered post. The applicant denied that it received the letter. It pointed out that the issue of the letter and its conveyance by registered post was a new issue which the parties never discussed even on the occasion on which there was a meeting to discuss the arrears. That meeting was not denied by the respondent, save that the respondent averred that its purpose was to discuss entering a new agreement, a position vehemently denied by the applicant's representative who averred that the purpose of the meeting was to serve him with the notice of breach and demand for rectification.

The issue of service of the letter of 15 December 2017 needs brief interrogation. As pointed out by the applicant the documents attached in support that there was service consist in two "certificates of posting a registered article". The document posted in respect to each certificate is endorsed as "letter". One is addressed to "Thompson Ngwenya Family Trust 748 Mukonono Street, Nharira, Norton". The other one is addressed to "Thompson Ngwenya Family Trust 13766 Galloway Park, Norton". There appears to be ineligible date stamps on the right end sides of the slips. The respondent did not explain when the letter was allegedly posted nor the missing dates. There is no explanation on why there would be need for two letters to be written or the need to address one of them to the stand number and the other one to the *domicilium citandi et executandi* on the agreement.

In relation to whether there was in fact service or delivery of the disputed letter upon the respondent, the certificates aforesaid which the respondent attached as proof of service of delivery of the letter to rectify breach fall short of proving delivery on a balance of probabilities. Without dates shown there is no indication that they could have been in respect of the delivery of the letter. The applicant is right to argue that without any confirmation by the delivery agent that the letter was received or delivered, it cannot be said that indeed the letter was delivered or received. Once the respondent had chosen to make delivery or service by pre-paid post, then it was necessary to get confirmation of the delivery because the mere fact that a communication has been sent to an addressee by pre-paid post is not *prima facie* evidence that delivery was

affected. There would need to be an acknowledgment of receipt of the letter by the person to whom it was addressed.

In a situation where an agreement provides that a notice of breach should be given by the aggrieved party to the party in default and the manner of service of such notice is not provided for the starting point would be to ascertain the intention of the parties. The clear intention would be that the offending party should be advised of the breach. The offending party can only know of the breach if it is advised of him or her as the case maybe. In such a situation, and in the absence of any specifically excluded method of delivery or one which the law does not permit, the party giving notice may use any method of service for as long as it fulfils its purpose and it is clear to the party being addressed that it is being given the contractual notice. *In casu*, the choice of the use of the pre-paid registered post method was acceptable as an expeditious and effective method of delivery. However, there is no evidence that it was received, let alone delivered. I therefore make the finding that albeit the parties not agreeing on the cancellation of the agreement in December 2017, still the respondent failed to prove on the balance of probabilities that its letter was delivered, served or received by the applicant.

The respondent also averred that the agreement of sale was in consequence of the letter to rectify dated 15 December 2017, cancelled in January 2018. In view of the finding of the invalidity of the letter of 17 December 2017 for failure to establish that it was delivered, the argument that the agreement was cancelled in January 2018 falls away and there is no need to interrogate the issue further. This leaves the parties at the position of the letters dated 9 June 2020 and 27 August 2020.

The respondent averred that the letter of 9 June 2020 was written in error because the sale agreement had already been cancelled in January 2018. Having determined that there was no valid cancellation, the agreement remained valid until properly cancelled. In the opposing affidavit, the deponent Bruce Chikwesha who is styled as the Client's Services Director was not the one who wrote the letters dated 9 June 2020 and 27 August 2020. He averred that the letters were written in error resulting from an "administrative mistake" which he made which was in the form of a misapprehension that the applicant had not been given previous notice in December 2017. It follows therefore that even if it is accepted that there was a mistake made in not noticing that a previous notice had been given, the fact that the previous notice was not valid means that the second notice which was received by the applicant and was acted upon was a valid notice. The applicant paid RTGS dollars on the sum stated in the agreement.

The respondent denied that it sought payment of the arrears in United States dollars. It did not deny that had it not cancelled the agreement, the amount of arrears stated on the letter of 9 June 2020 was the correct amount. The responded returned the payment of RTGS $15 625 made by the applicant for the sole reason that there was no basis to accept it since the agreement had been cancelled. The arguments of *quasi* mutual consent and *justus* error in writing the letter of 9 June 2020 and the consequences arising therefrom do not in my view arise because once it is found as I have done that the alleged cancellation of the agreement of 15 December 2017 was not perfecta and therefore invalid, the parties remained covenated to the agreement.

I turn to the relief sought. The applicant seeks a declaration that the purported cancellation of the agreement of sale is declared null and void. I have found so. In relation to consequential relief, the applicant seeks an order that the respondent should be ordered to accept payment of ZWL$15 625 and that all further payments should be in local currency until there is full settlement of the balance. There is no justification for such an order. The agreement provides for payment in United States dollars. The respondent is entitled to clear payment in the currency of the agreement. The issue that arises is what amount in the currency of payment equals to the amount of United States dollars due if the applicant successfully argues that it should pay the money in RTGS dollars. The matter was not subjected to full argument understandably so because of the nature of the issues to which the parties addressed themselves in the main. In the exercise of my discretion to refuse to make a declaration I consider that it would result in an injustice were I to dictate and declare that the payment of RTGS dollars in the sum of $15 625 is acceptable as full payment for arrears. The parties can set down and agree on this or seek the courts intervention subsequently. I am also mindful of the fact that in the letter by the applicant dated 9 July 2020, there are attached two receipts for payment of $500 and $250 allegedly made on 23 October 2017 and 24 January 2018 respectively. The applicant states that the amounts were not taken into account in computing the arrears. There needs to be full ventilation on the issue of arrears and the parties' relationship in the aftermath of the declaration of validity of the sale agreement.

The last issue relates to costs which the applicant seeks at the scale of attorney and client. Such level of costs is punitive and intended to punish a litigant for conduct which the court strongly disapproves of. The applicant did not justify such scale of costs. In the case of *Tilsit and Sationeses (Pvt) Ltd + Anor* v *Donie Control Corp (Pvt) Ltd* HB 252/20 DUBE BANDA J stated at p 7 of the cyclostyled and I am in full agreement with him:-

> "To mulct a litigant in primitive costs requires a proper explanation grounded in our law. All the above said, these costs that are mend to be penal in character and are therefore supposed to be ordered only when it is necessary to inflict some financial pain to deter wholly inacceptable behaviour and instil respect for the court and its processes."

In casu, the applicant was in default of his instalment payment obligations. There was a genuine dispute which the court had to determine. The respondent's defence of this application cannot be said to have *mala fide*. I have no reason to rebuke the conduct of the respondent and ordinary costs must be decreed.

It is accordingly ordered as follows:-

1. It be and is hereby declared that the agreement of sale dated 14 January 2016 between the applicant and respondent relating to stand 13766 Norton Township of Galloway situate in the District of Hartley measuring 2460 square metres remains valid and binding on the applicant and respondent.
2. The claim for an order that the respondent should accept payment of ZWL$15 625 and subsequent payments in local currency to settle the applicants outstanding obligations arising from the agreement is dismissed.
3. The respondent to pay costs of this application.

Chinawa Law Chambers, applicant's legal practitioners
Tanyanyiwa Gapare Attorneys, respondent's legal practitioners