ISHMEL CHINHO
versus
CROWHILL FARM (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE 18 July and 14 September 2016

Opposed Matter

S Rugwaro, for the applicant
C. W Gumiro, for the respondent

TAGU J: The applicant filed this application seeking for an order directing the respondent to refund him all the money that the applicant paid to the respondent pursuant to an agreement that the applicant entered with the respondent on 28 April 2011.

The application is opposed by the respondent.

The undisputed facts are that the applicant responded to an advertisement flighted by the respondent's Agents Darwin Properties (PVT) LTD offering to sell serviced but undeveloped stands. The applicant was taken to Crowhill Farm where he was shown several stands. The applicant was shown stand 2097 of Lot J Borrowdale, measuring approximately 1000 square metres, held under Deed of Transfer number 1214/86 which was also under sale. The applicant was advised that the said stand cost $ 30 618.75 which purchase price was payable as cash or instalments. He was further advised that the servicing and development of the stand would be completed by May 2013 or within two years from date of transfer. The applicant accepted the offer and an agreement between the two parties was signed on 28 April 2011.

The other terms of the agreement were that a deposit of $1 500.00 was to be paid upon signature of the agreement. The Balance of $ 29 118.75 was to be paid within sixty months on a monthly instalment basis. In the event of any breach by either party the aggrieved party would give a thirty day notice to the other party to remedy its breach failure of which such party would cancel the agreement. In the event of the seller cancelling the

agreement the provisions of the Contractual Penalties Act [*Chapter 8:04]* would be applicable. That all notices were to be delivered to the chosen addresses for service of the parties.

The applicant religiously complied with his obligations serve for few delays and paid a total of $17 000. 00. However, the applicant checked and noticed that there were no developments taking place on the site after several months and that there was no equipment or servicing taking place. The applicant then duly enquired with the Estate Agent why there was no development taking place on the stand. The Estate Agent told the applicant that there were problems which involved a third party who was claiming the same land.

The applicant was now not sure whether the project would succeed. He then wrote a letter to the respondent dated 15 June 2013 part of which read as follows-

> "I write to you in connection with the agreement of sale we entered into on the 28th April 2011.
>
> Despite the fact that I have been consistent with my payments and wherever delayed penalty interest has been levied, I have noticed that you have not met your obligations in terms of clause 9 of the agreement.
>
> I am worried that there are no developments on the project and it does not seem you will be able to meet your undertakings.
>
> I have also heard that there is a third party claim to the whole project.
> I am afraid that my investments will go down the drain due to the above. I need assurances on the above issues.
>
> Pending such and clarification and assurance I shall withhold any further payments. In order to limit my exposure.
>
> I am giving you 30 days within which to address the above subsequent to which I shall withhold any future payments until the anomaly has been rectified."

Despite being served with the above letter the respondent did not respond. Being cautious and in an attempt to avoid further risky exposure, the applicant stalled further payments as he noticed the respondent had either abandoned the project or was not keen on completing it.

Time passed on nothing changed. The applicant again went to the respondent's agent to enquire if there was any further progress. It was then that the applicant was advised that the stand had been repossessed and sold to another person. The applicant was baffled as to how the stand was repossessed and the agreement cancelled without the courtesy of him having been given notice in terms of the agreement or a response to his earlier letter. It was then that the respondent's agent produced a letter dated 12 September 2013 purportedly giving the

applicant 30 days within which to remedy the breach failure of which the respondent was cancelling the agreement in terms of clause 8.2.1 of the agreement. That letter had never been served onto the applicant before.

The applicant then approached his legal practitioners who then wrote three letters dated 17 November 2014, 10 December 2014 and 10 March 2015 respectively to the respondent requesting for information as to how the stand was repossessed and the agreement cancelled without notifying the applicant.

To date those three letters have not been responded to by the respondent. This compelled the applicant to file the present application to compel the respondent to refund him the money he paid since in his view the respondent was the one in breach of the agreement.
The respondent submitted that it was in fact the applicant who breached the agreement in that the applicant defaulted making his monthly payments since May 2013. The respondent said the purported letter dated 15 June 2013 was actually written by the applicant after the agreement had been cancelled and the stand repossessed.

One Sibongile Mutero who deposed to an affidavit on behalf of the respondent stated in para 9 of her founding affidavit that-

> "….Applicant defaulted in May 2013 in making the monthly instalments. On the 19th September 2013 the Respondent advised the applicant to remedy his breach through a letter hereto attached as Annexure "A". Again the applicant failed to remedy the breach as per the notice letter and consequently the agreement of sale was cancelled. Applicant made an attempt on the 14th November 20`14 to reengage the Respondent to resuscitate the agreement of sale. Applicant was accordingly advised that the agreement was cancelled. I attach hereto as Annexure "B1" and "B2" the correspondences between the parties regarding cancellation." (my underlining)

Having heard counsels and perusing documents filed of record I was convinced beyond doubt that as at June 2013 when the applicant wrote his letter dated 15 June 2013 there was no proof that the respondent was committed to the terms of the agreement despite having received huge sums of money from the applicant in that no proof of service was taking place on the said stand.

Further, I was not persuaded that the applicant was the one who breached payments in or about May 2013 as stated in the founding affidavit of Sibongile Mutero. I say so because on 10 June 2013 the applicant paid an amount of $650 00.00 plus penalty levies on receipt numbers 6879 and 6880 respectively through DARWIN Properties who are the respondent's agents and the cash was received by one TATENDA. The last instalment made by the applicant was paid through Darwin Properties on receipt 7114 for an amount of $ 650-00 and the cash was received by one Success on 8 August 2013.

Surely it does not make sense that a payment having been made on 8 August 2013, the respondent found it necessary to write the notice of letter on the 12 September 2013 reminding the applicant to remedy breach that occurred in May 2013.

The correct position is that despite having written his letter dated 15 June 2013 giving the respondent 30 day notice within to remedy the breach, the applicant continued paying his instalments while waiting for a response to his letter which response never came from the respondent. He then out of caution stopped making further payments after he heard of a third party who claimed ownership of the same stand and having failed to get response from the respondent to his letter. It is therefore not true that the letter dated 15 June 2013 could have been written after the agreement was cancelled.

Besides, Sibongile Mutero made references to Annexures "B1"and "B2" in her founding affidavit but none are filed of record. If anything the letter by the respondent dated 12 September 2013 is the one that was written after the applicant had already given the respondent 30 days within which to remedy his breach. The one who was actually in breach of the agreement was the respondent and not the applicant. The reason for not making further payments was a wise decision by the applicant to limit his exposure as per his letter dated the 15 June 2013. In my view it would be unfair for the respondent to retain the amount paid in terms of the Contractual Penalties Act chapter 8. 04 when it was the respondent who was in breach of the agreement. Since the respondent breached the agreement the agreement of sale is duly cancelled.

Wherefore, it is ordered that-

1. The agreement of sale of stand number 2097 Lot J Borrowdale held under Deed of Transfer number 1214/86 dated 28 April 2011 between the Applicant and the Respondent be and is hereby cancelled.
2. The Respondent is hereby ordered to forthwith refund the Applicant the sum of $18 490.00 (Eighteen thousand four hundred and ninety dollars) paid by the Applicant towards the purchase of the property.
3. That the Respondent pays the cost of suit on a legal practitioner and client scale.

S, Rugwaro & Associates, applicant's legal practitioners
Ngarava Moyo & Chikono, respondent's legal practitioners