

SALTANA ENTERPRISES (PVT) LTD  
versus  
NGONI TAKUNDWA  
and  
NYEMWERAYI MASENDA

HIGH COURT OF ZIMBABWE  
MUSHORE J  
HARARE, 30 November 2016 & 8 March 2017

**Opposed motion - special plea in abatement-Prescription**

*P Mashiri*, for the applicant  
*N Mukandagumbo*, for the respondent

MUSHORE J: The dispute between the plaintiff and the defendants originated from a court action. The respondents purchased a certain residential piece of land situate in the Salisbury District called Stand 7929 Warren Park Township of Warren Park in terms of an agreement of sale signed on 11 February 2002. The purchase price for the property was ZWD 804,800-00 which amount was to be paid within 60 months with the initial deposit of ZWD 224,700-00 being due immediately upon signing the agreement. The remaining amount was to be paid in monthly instalments. It is alleged by the plaintiff that it is entitled to evict the defendants from the property arising from:-

- (a) a failure on the defendants part to pay the purchase price in full; and
- (b) the defendants' disqualification from owning the property due to some Municipal Rules and Regulations pertaining to the Housing Delivery System.

In the circumstances the plaintiff has taken the position that the defendants are not allowed to remain in occupation of the property in question. The plaintiff wishes to re-take possession of the property.

The defendants responded by filing a plea in abatement on the grounds that the claim had prescribed. They accepted that they had not paid the full amount due to the plaintiff and explained that they had paid the initial deposit of ZWD 224, 700-00 on the date of signing the agreement; after which they took occupation of the property and began paying the balance of

the purchase price and thus commenced to pay instalments on 11 February 2002. The specific wording of the payment clause in the agreement of sale is as follows:-

**“3. PURCHASE PRICE**

- 3.1. The purchase price shall be \$804 800-00 (eight hundred and four thousand eight hundred dollars) payable by way of a deposit of 25% being \$224 700-00 (two hundred and twenty four thousand seven hundred dollars) of the purchase price. The deposit shall be paid upon signing of this agreement.
- 3.2. The balance of the purchase price in the sum of \$580 100-00 (five hundred and eighty thousand one hundred dollars) (exclusive of interest) shall be paid in monthly instalments of not less than \$15 836-83 (fifteen thousand eight hundred and thirty six dollars and eighty three cents) per month over a period of (60) sixty months. The first instalment to be made on or before the first day of the month after payment of the deposit and each instalment thereafter shall be paid on or before the first day of each succeeding month.
- 3.3. ....
- 3.4. ....
- 3.5. ....
- 3.6. In the event of the Purchaser falling into arrears with the payment of any instalments, the whole remaining balance of the purchase price together with interest and any other charges due in terms of this agreement shall immediately become due and payable and no leniency or indulgence on the part of the Seller, and in particular no acceptance of late instalments, shall in any way whatsoever be deemed to be a waiver of the Seller’s rights in this regard unless such waiver is made in writing”

The default clause which the plaintiff is reliant on in seeking defendants’ eviction reads as follows:-

**“13. DEFAULT**

- 13.1 In the event of the purchaser failing to effect any payment due hereunder or in the event of the purchaser committing a material breach of the terms and conditions of this Agreement and failing to make such payment or to rectify the breach within thirty one (31) days of the date of the written notice by or on behalf of the Seller calling upon the Purchaser to do so, then the Seller shall be entitled, without prejudice to any other remedy the seller may have granted the Purchaser; either
  - 13.1.1 to claim from the Purchaser immediate payment of the full balance of the purchase price then outstanding together with interest at the rate stated in para..... hereof calculated from the date of the default together with any other charges due in terms of the agreement or;
  - 13.1.2 to cancel the Agreement without further notice , re-take possession of the property and retain all payments made by the purchaser as rowwkoop, subject to the provisions of the Contractual Penalties Act [Chapter 8:04]
  - 13.1.3 .....

The defendants have been forthright about the fact that they did not make all the payments as required in terms of the agreement of sale. They began in earnest and then simply stopped paying.

The default and payment clauses require that the full amount was to be paid by 10 February 2007 when calculating 60 months from 10 February 2002.

In terms of s 13.1.1, when the defendants first defaulted in paying their instalments, the plaintiff could have demanded that the defendant paid the full amount immediately. The plaintiff's declaration was poorly drafted and the plaintiff makes no mention of the date of the alleged breach neither does he offer up any details as to the amount which the defendants allegedly owed. It is not clear from the plaintiff's declaration what date he deems defendant to have defaulted in making payment. Thus although a breach of contract is alleged to have occurred, I am not aware as to how and when the defendants breached the contract, neither has the plaintiff taken the court into its confidence as to the exact date when the defendants stopped paying the monthly instalments. In that regard it seems that the plaintiff never made a demand placing the defendants in *mora* on the elapse of the 60 months. Thus the only demand which I can see is the issuance of summons by the plaintiff.

In their joint plea, the defendants have submitted that they did not complete payment of the purchase price, and then they point to the fact that in the absence of the plaintiff having placed them in *mora* during the 60 months of the period of payment, then the only date from which prescription can be offset is the date when the entire sum became due to the plaintiff; that being on the elapse of 60 months. They contend thus, that the plaintiff's demand should have been made within three years after the elapse of 60 months; hence 3 years after 19 February 2007. To that end the defendants aver that by the plaintiff filing summons on 1 November 2016, the plaintiff's claim has been extinguished by operation of the law.

The plaintiff's reply is that because the claim is one for eviction, and not the recovery of a debt, therefore in the terms of the Prescription Act [*Chapter 8:10*], it has not prescribed. It is worth repeating what may seem trite to some but not so obvious to others. A debt in terms of s 2 of the Prescription Act [*Chapter 8:10*] is:

“debt”; without limiting the meaning of the term, includes anything which may be sued for or claimed by reason of an obligation arising from statute, contract, delict or otherwise”

Thus the prayer for eviction has been extinguished by operation of the law.

I would be derelict in the discharge of my judicial duty, if I failed to comment on a core issue. That is the propriety of the claim itself as drafted and presented by the plaintiff's attorneys.

Although the prayer in the declaration is one for eviction and legal costs, the cause of action originates from the agreement of sale and its breach by the defendant. The plaintiff has brought this action arising from the non-payment of the full purchase price of the

immoveable property. Thus the eviction is the award which may be granted in the plaintiff's favour if the plaintiff established that he has a legal right to the cancellation itself.

The defendants have not challenged the averment made by the plaintiff that they have not paid the full amount due so that is not the issue. It is rather that the plaintiff has not sought to ask the court to cancel the agreement itself, because it is by that pronouncement having been made that any remedy may flow to the plaintiff; whether that be eviction or other relief. Messrs Herbstein and Van Winsen in their book "*The Civil Practice of the High Courts of South Africa*" 5<sup>th</sup> Ed: p 579 speak of the details required in both a summons and the declaration by stating that:-

"Both documents serve the same purpose. Both should contain a statement of the material facts relied upon by a plaintiff in support of his claim against a defendant, the conclusion of law that he is entitled to deduce from the facts stated therein and a prayer for the appropriate relief."

The declaration filed in the present matter has makes no reference to the antecedent to eviction; that being a prayer for cancellation of the agreement. Such a prayer is necessary for the court to be able to adjudicate on the *status quo* of the agreement which necessarily binds the parties until the court determines otherwise. The contract was concluded in terms of the Contractual Penalties Act [*Chapter 8:04*]. The parties are bound to the terms of the Act as per s 13.1.2 of the Agreement of Sale which provides that cancellation of the agreement by the seller shall be done in terms of the Act as follows:-

"13.1.2.To cancel the agreement without further notice, re-take possession of the property and retain all payments made by the Purchaser as rouwkoop, subject to the provisions of the Contractual Penalties Act [*Chapter 8:04*]"

The court has the discretion to determine the relief due to a creditor upon the happening of an act, omission or withdrawal by the debtor. It is not for the seller to claim that relief as of a right. Section 4 of the Contractual Penalties Act makes that abundantly clear in stating:-

- "4. Penalty stipulations enforceable-
- (1) Subject to this Act, a penalty stipulation shall be enforceable in any competent court;
  - (2) If it appears to a court that the penalty is out of proportion to any prejudice suffered by the creditor as a result of, or omission or withdrawal giving rise to liability under a penalty stipulation, the court may:-
    - (a) reduce the penalty to such an extent as the court considers just and equitable under the circumstances;

- (b) grant other relief as the court considers will be just and fair to the parties.
- (3) .....
  - a. In determining the extent of any prejudice for the purposes of section (2) a court shall take into consideration not only the creditor's proprietary interest but every other rightful interest which may be affected by the act, omission or withdrawal in question".

The plaintiff has declared in para 9 of the declaration that record p 4-

“as rightful owner of the premises sold it to Mr and Mrs Musuwa hence is now the ones with a right to occupy the property, and is thus entitled to an eviction order against the defendants and all those claiming occupation through them”.

I do not intend to get bogged down into the details as to why Mr and Mrs Musunda, as the purported ‘rightful owners’ are neither suing nor joined to the proceedings. However I am merely emphasising that the plaintiff's actions are not justifiable neither are they tenable in terms of the Contractual Penalties Act.

Section 8 of the Contractual Penalties Act restricts the seller's rights as follows:-

- “8. Restriction of seller's rights
  - (1) No seller under an instalment of land may, on account of any breach of contract by the purchaser-
    - a. enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or
    - b. terminate the contract;
    - c. institute any proceedings unless he has given notice in terms of subsection (2) and the period of the notice has expired without the breach being remedied, rectified or discontinued; as the case may be.
  - (2) Notice for the purposes of subsection (1) shall
    - a. be given in writing to the purchaser; and
    - b. advise the purchaser to remedy, rectify or, desist from continuing, as the case may be; the breach....”

Section 8 (3) provides for the manner in which written notice must be served on the purchaser.

In the present matter, the plaintiff acted without the sanction of the court and without observing peremptory provisions of the Contractual Penalties Act mentioned. In fact the plaintiff relentlessly secured its own interests without regard to the defendants' rights and whilst in the process unlawfully sold the property and wrongly unjustly enriched itself in the process. There is no record of a notice to rectify or desist having been served on the defendants as strictly required by the Act. All that is shown in the declaration are unverified mentions of demands were made which are denied by the defendants. In the absence of a demonstration that the procedures required of the plaintiff were observed, it is abundantly

obvious that the agreement of sale was never cancelled in accordance with the law. In the result, the agreement of sale entered into on 11 February still subsists.

The plaintiff's actions cannot be ratified by the court as having been lawful. In short therefore, the prayer for eviction is wholly without merit even discounting the element of prescription having extinguished any right which the plaintiff thought it had to evict the defendants.

See: *Chirinda v Konrad van der Merwe & Anor* HH-51-13.

In the result, I find in favour of the defendants and I accordingly uphold their special plea. The plaintiff's claim is dismissed with costs.

*Makiya & Partner's*, applicant's legal practitioners  
*Zimudzi & Associates*, respondent's legal practitioners