NATIONAL SHUNT SERVICES (PRIVATE) LIMITED
versus
THE CITY OF HARARE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 4 June and 15 September 2021

Opposed application

W Muchengeti, for the applicant
C Kwaramba, for the respondent

1. TSANGA J: The applicant seeks a declaratur in terms of s 14 of the High Court Act for a pronouncement on the status of an agreement of sale entered into with the respondent, the City of Harare. In particular, the pronouncement sought by the applicant is that the cancellation of an agreement of sale it entered into in August 2017 with the respondent, in respect of immovable property known as stand 822 of stand 129, Greystone Township, be declared null and void. The applicant had initially also sought an order that the respondent be ordered to furnish it with a subdivision permit in respect of that stand within 10 days of the court order. This would enable it to commence the design of plans for the construction of the principal buildings. However, at the hearing, that aspect of the order was abandoned on account of the permit being a town planning issue. The issue that remained for decision was therefore the validity of the cancellation of the agreement by the respondent.

The background to the declaratur sought.

2. In 2007, the applicant entered into a lease of the described property with the respondent with the intention of developing a golf range. In July 2017, the parties subsequently entered into an agreement of sale in respect of that portion of the property that was still available for sale, the other part having since been divided by the respondent into residential stands.

3. It is not in dispute that the sum payable for the stand was US$ 327 750.00 of which US$110 000.00 was to be paid upon signing of the agreement. This initial sum was indeed paid as per agreement. The remaining balance was to be paid within 30 days of the agreement of sale, failing

which interest would be levied in accordance with the prevailing market rate at the same time. Clause 6 read as follows:

> "The parties agree that the purchase price of the Property is US$327 750.00 (**Three Hundred and Twenty Seven Thousand Seven Hundred United States Dollars)** including **VAT** which amount shall be paid as One Third upon signing of the agreement and the balance be paid within **Thirty (30)** days of the date of execution hereof (**hereinafter referred to as "The Date of Sale")** failing which interest shall be levied on the purchase price of any part thereof at prevailing interest rates dictated by the market at time such (*sic*) provided the Purchaser shall be allowed to erect principal buildings mentioned in clause 8.1 below only after full payment of the purchase price."

4. As part of the agreement, the construction of buildings designed for golf driving range purposes was to be commenced within two years from date of sale and completed within four years from that date. In terms of clause 6 as extracted above such, construction of buildings would only commence after payment of the full purchase price.

5. It is not disputed that the applicant only purported to pay the balance in December 2019, more than two years after the execution of the agreement of sale in August 2017, which had set the time frame for payment as 30 days from the date of execution of the sale. As for the buildings these had not yet been carried out. According to applicant, in reality construction could only be commenced after the property had been surveyed but the subdivision permit necessary for the survey to be carried out could not be located at the Council offices. The respondent having delayed in having the land surveyed, the applicant had had this done privately but the respondent had indicated that it would only abide by its own surveyor. The applicant averred that in the meantime it had effected improvements in excess of the US$80 000.00 minus the buildings required in the agreement of sale. These improvements included an environmental assessment, levelling the ground, lawn planting and sinking a borehole. A tractor and lawn mower had also been purchased as well as irrigation equipment. The property had also been fenced based on the diagram produced by the private surveyor.

6. Against this backdrop as narrated by the applicant, in June 2020 the respondent had written a letter to the applicant terminating the agreement. This was purportedly in terms of clause 14 of the agreement that permitted termination of the agreement on 30 days' notice. That clause 14 read as follows:

> "A party may give **30 (thirty)** days' notice to the other party to terminate this agreement and upon expiry of such notice this agreement shall cease to have effect."

7. The specific grounds also mentioned in that letter dated 16 June 2020, were the failure to pay the purchase price timeously, and, secondly, failure to erect the principal buildings timeously. The letter is important as it is at the centre of the dispute. It read as follows:

> **"NOTICE OF TERMINATION TO AGREEMENT OF SALE FOR STAND NUMBER 822 OF STAND 129 GREYSTONE TOWNSHIP HARARE**
>
> **1.** Reference is made to the above matter.
> **2.** Notice is hereby given of the termination of the Agreement entered into on the 11th of August 2017 as contemplated by clause 14 of the agreement.
> **3.** In addition to the above mentioned termination on notice, you breached the agreement by failing to pay the full purchase price timeously as contemplated in clause 6 of the garment and by failing to timeously commence the erection of principal buildings as contemplated by clause 8.2 of the agreement.
> **4.** As a result of the above mentioned termination, Council hereby tenders the repayment of all the amounts paid pursuant to this agreement less any relevant deductions as contemplated by clauses 8.3, 8.4 and 8.5.
> **5.** For this notice serves as 30 days' notice of termination."

The gravamen of the dispute

8. The applicant takes issue with the respondent's purported cancellation of the agreement with effect from a future date. Applicant also says that there was no interpellation or demand calling upon it to perform by a specified date. As such, applicant argues that the contract cannot be cancelled without placing it *in mora* since the agreement is said to have required 30 days written notice to rectify any breach.

Clause 12 on breach read as follows:

> "Should either party breach any of the terms and / or conditions of this agreement the aggrieved party **may** give the other party **thirty (30) days** written notice to remedy such breach, failing which it shall without prejudice to any other rights it may have had under the law, cancel the agreement, or claim specific performance and in either event claim any damages occasioned by the breach"

9. Furthermore, in terms of buildings which were said to have been erected within two years from date of sale, applicant's position is that the two years grace period was to be reckoned from November 2019 when the full purchase price was paid.

10. As for the delay in effecting the payment itself, the applicant denies it was in breach since there was a remedy provided which was the payment of interest. Applicant argues that this is the option that the respondent should have gone for instead of cancellation and maintains that it therefore validly paid the full purchase price which was accepted in November 2019. Applicant

says it is entitled to commence erection of the principal buildings. Costs of suit are sought on a higher scale owing to what is described as a brazen manner of cancellation of the contract.

12. In opposition, the respondent's position is that the balance was to be paid in 30 days from the date of execution of the agreement being the 17 of August 2017 which was the date of the last signature. Upon failure by the applicant to adhere to the specified time frame, the cancellation is therefore said to have been in order. Applicant is also said to have failed to erect any buildings in accordance with the agreement. The respondent also states that the applicant never raised any issue regarding a subdivision permit not being found. The effecting of any improvements without Council approval is said to have been in breach of the agreement.

13. Respondent also asserts that in terms of clause 14 of the agreement, it was not obliged to give reasons for termination or to place the applicant *in mora* and that termination was an option given to either party. The termination letter is said to have been very specific as to the clause under which it was brought. Respondent maintains that the notice of termination also stated that the notice served as the 30 days' notice of termination in line with the agreement. Respondent too seeks costs on a higher scale on the basis that this application has therefore been unnecessarily made.

The Core Legal Arguments

14. At the hearing Mr. *Muchengeti* for the applicant argued that the core issue is whether the notice of termination from a future date was valid. In so far as the letter conveyed a notice to terminate in 30 days, he argued that it was not a notice of termination. He argued that clause 14 of the agreement also fell foul of the law which requires termination to be immediate and final.

15. He relied on the case of *Waste Management Services* v *City of Harare* SC 126/02 in which SANDURA JA as he then was, cited with approval the case of *Ganief* v *Hoosen* 1977 (4) SA 458 (C) in which it was held that a notice of cancellation must embody an unqualified, immediate and final decision to treat the agreement as at an end.

16. In the *Waste Management* case, the offending part of the notice by the City of Harare which purported to bring a contract to an end for unsatisfactory performance read as follows:

> "In the circumstances, you are hereby notified that the contract is cancelled with effect from 31 March 2000."

That letter had been received in the afternoon of 30 March 2000. The majority judges in that case held that 31 March 2000 was a future date and that the termination was invalid whilst one judge dissented and wrote a dissenting opinion that the termination was clear.

17. Mr *Kwaramb*a for the respondent on the other hand, emphasized that the nature of the notice given was a notice of cancellation and argued that it was distinguishable from the notice of cancellation in the *Waste Management* case. The distinction was said to be in the fact that the notice *in casu* did not convey an intention to terminate but that it was a notice of termination itself. He emphasized that the notice left no doubt as to the termination of the agreement. He also highlighted that the applicant's argument was not that the respondent did not have a right to terminate in terms of clause 14 of the agreement but that the clause constitutes an unfair practice and that it is unenforceable. In so far as the issue of the validity of this clause was being made in the heads of argument, Mr *Kwaramba* argued that this was improper and that in any event the issue of severance of the offending clause had to be brought before a court of law according to the agreement. He therefore maintained that it was not open to rewrite the contract or excuse any party from its consequences since Council acted in terms of clause 14. He maintained that clause 14 was binding and could not be held invalid.

18. Regarding the failure to pay the purchase price timeously, he argued that time was of essence yet the applicant took two years to pay money which was due in 30 days. He emphasized that the cancellation was therefore also done because of the failure to comply with the terms of payment of the purchase price and that the contract as such could be terminated on the basis of breach. See *Kundai Magodora & Ors* v *Care SC 24 /14*

In his response to these arguments, Mr *Muchengeti* maintained that the notice was futuristic and that the parties are not free to contract outside of what the law says.

Analysis

19. The issue is whether clause 5 of the letter which stated that "this notice serves as 30 days' notice of termination" was in fact a futuristic clause and a notice of intention to cancel or whether it was in and of itself a notice of cancellation. As explained by A J Kerr, in his article on "*Notices of Intention to Cancel a Contract, Conditional Notices of Cancellation, and Notice of Cancellation Simpliciter.*" a notice of cancellation simpliciter is given under the following circumstances:

> The phrase 'notice of cancellation (or rescission)' in its simple form properly applies to notices conveying a decision to cancel in circumstances in which the aggrieved party is entitled to cancel the contract there and then; the date and time of cancellation in the ordinary case (for the extraordinary cases see the present writer's *Contract* 210-12) being the date and time when the decision is conveyed to the mind of the other party. Such notices may be sent when performance has not been rendered at the time stipulated in the contract, and promptness in performance has all along been regarded as a matter of major importance (for instance, if there is a forfeiture clause); or when performance has not been rendered within the reasonable time given in a notice of intention to cancel; or when there has been a major breach of contract of some other kind.[1]

20. This overview of what constitutes a notice of cancellation simpliciter is important in that it provides the parameters for ascertaining whether the notice *in casu* is distinguishable from the *Waste Management* case. Of significance is that such a notice may be sent out when performance has not been rendered within the time frame specified in the contract where time was of essence. An immediate notice of cancellation may also be sent out when performance has not been rendered within any time that may have been given to a party to perform in the notice of intention of cancel. Finally such a notice of immediate cancellation may also be sent out in those circumstances where there has been a major breach of some other kind.

21. It is not in dispute that the balance of the purchase price had a time frame within which it was to be paid. Time therefore did matter in the agreement. It is not in dispute that the balance was not paid within that time frame. The balance was to be paid within 30 days failing which interest would be levied. The agreement was, however, silent as to the length of time that would be countenanced by the seller for this situation to prevail where interest could be levied. But even if clause 6 allowed for interest to be levied on a belated payment, a period well in excess of two years before the balance was paid could not by any stretch of the imagination be what the parties intended. There is no evidence placed on record that the applicant even attempted to discuss the issue of its inordinate delay with the respondent before effecting the purported payment of balance of the purchase price two years later when so much had happened in the fiscal arena.

22. As regards no notification of being *in mora*, in terms of clause 12 of the agreement of sale which addressed breach, whilst the aggrieved party could give the other party 30 days written notice to remedy the breach, the clause was not couched in mandatory terms.

> "Should either party breach any of the terms and /or conditions of this agreement the party **may** give the other party 30 days written notice to remedy such breach…."

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[1] Kerr, A. J. " Notices of Intention to Cancel a Contract, Conditional Notices of Cancellation, and Notice of Cancellation Simpliciter. " South African Law Journal, vol. 90, no. 2, May 1973, p. 109-113. HeinOnline.

What distinguishes the *Waste Management* supra case from this one is that herein the parties in fact had an agreement which embodied the specifics of cancellation. In other words, the applicant's case is weakened by the fact that it signed an agreement where the obligation to give notice to rectify a breach was not mandatory.

23. Furthermore, clause 14 permitted a written notice to other party to terminate at any time. This court cannot make an agreement for the parties. The applicant agreed to the clause that stated that the contract could be ended at any time. The letter itself left no doubt as to what the immediate intention was which immediate termination. There was no ambiguity there from the wording of the letter in line with clause 14 of the agreement which applicant freely signed. The notice sent out to the applicant on 15 June 2020 specifically advised the applicant that the agreement was terminated whilst giving the applicant requisite thirty days' notice. Applicant had long since breached the agreement *vis a vis* payment of purchase price and the need to effect buildings as per agreement. It was a notice of cancellation as opposed to a notice of intention to cancel within 30 days.

24. Also it cannot be said that the applicant was at sea as to the meaning of the notice it received given the circumstances of this case. The notice embodied "an unqualified, immediate and final decision to treat the agreement as at an end". The declaration sought in this instance that the cancellation was therefore improper is not supported by the facts.

However, I do not believe that costs on a higher scale are justified.

Accordingly, the application is dismissed with costs.

Muchengeti & Company, applicant's legal Practitioners
Mbidzo Muchadehama Makoni, respondent's legal Practitioners