REPORTABLE ZLR (72)

Judgment No. S.C. 135/99
Civil Appeal No. 86/99

TIMOTHY JOHN WALTER PRESTON vs

(1) CHARUMA BLASTING & EARTHMOVING SERVICES (PRIVATE) LIMITED

(2) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
EBRAHIM JA, MUCHECHETERE JA & SANDURA JA
HARARE, SEPTEMBER 16, 1999

H Zhou, for the appellant

C Hungwe, for the first respondent

No appearance for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which set aside the purported cancellation of an agreement of sale by the appellant. After hearing both counsel, we dismissed the appeal with costs and indicated that our reasons would be handed down in due course. I now set them out.

The facts are as follows. On 16 July 1998 the appellant and the first respondent ("the respondent") concluded an agreement of sale in terms of which the respondent purchased from the appellant a piece of land at Ruwa ("the property"). The agreed purchase price was $2 500 000.00. It was agreed that the respondent would pay a deposit of $500 000.00 to Tony West Real Estate (Private) Limited ("the Estate Agent") on or before 22 July 1998, and that the balance of $2 000 000.00

would be paid to the Estate Agent in four monthly instalments of $500 000.00, the first instalment being payable on or before 5 August 1998. Subsequent instalments were to be paid on or before the 5th day of each month, and the transfer of the property to the respondent was to be effected after the purchase price had been paid in full.

It was further agreed that if the respondent failed to pay any instalment by the due date, the appellant was entitled to give to the respondent notice in writing requiring it to pay the instalment within fourteen days, and that if it failed to pay the instalment within that period, the appellant was entitled to cancel the sale and repossess the property, or claim payment of the whole balance of the purchase price.

Following the signing of the agreement, the respondent paid the deposit of $500 000.00, not on or before 22 July 1998 as agreed, but on 6 August 1998. Thereafter, the first instalment, which was supposed to be paid on or before 5 August 1998, was paid on 13 August 1998.

Subsequently, when the second instalment was not paid by 5 September 1998, the Estate Agent wrote to the respondent as follows:

> "In terms of Clause 1 of the above Agreement of Sale you entered into with Mr T Preston, you are required to pay $500 000.00 (Five hundred thousand dollars) by the 5th September 1998. The money has not been received.
>
> It therefore stands to reason that the Seller is being prejudiced.
>
> You are therefore advised that you are in breach of the Agreement of Sale in terms of Clause 7 of the Agreement. You therefore have fourteen (14) days from the date hereof to pay the full outstanding amount inclusive of interest.
>
> You are urged to give this matter your utmost URGENT attention."

When there was no response to that letter, the Estate Agent wrote to the respondent as follows:

> "Further to our Notice of the 5th September 1998 to you requiring you to pay the full outstanding amount inclusive of interest within 14 days, we have not received payment. This sale is therefore cancelled in terms of Clause 7 of the above Agreement of Sale."

The purported cancellation of the sale agreement provoked an immediate reply from the respondent's legal practitioner, who informed the Estate Agent that the cancellation was invalid because the respondent had not been given thirty days notice of the proposed cancellation. The notice of thirty days duration was required in terms of s 8(1) of the Contractual Penalties Act [*Chapter 8:04*] ("the Act"). Nevertheless, the Estate Agent appeared unconcerned by the issue raised by the respondent's legal practitioner.

Consequently, the respondent filed an urgent Chamber application in the High Court seeking an order setting aside the purported cancellation of the sale agreement. The application was granted on 2 March 1999. Aggrieved by that result, the appellant appealed to this Court.

The main issue to be determined in this appeal is whether the notice given to the respondent by the Estate Agent satisfied the requirements of s 8(1), as read with s 8(2), of the Act.

Section 8(1) of the Act reads as follows:

> "No seller under an instalment sale 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; or

(c) institute any proceedings for damages;

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."

Subsection (2) of s 8 of the Act reads as follows:

"Notice for the purposes of subsection (1) shall -

(a) be given in writing to the purchaser; and

(b) advise the purchaser of the breach concerned; and

(c) call upon the purchaser to remedy, rectify or desist from continuing, as the case may be, the breach concerned within a reasonable period specified in the notice, which period shall not be less than -

(i) the period fixed for the purpose in the instalment sale of the land concerned; or

(ii) thirty days;

whichever is the longer period."

The provisions of the Act set out above apply to an instalment sale of land which, in s 2 of the Act, is defined as follows:

"Instalment sale of land means a contract for the sale of land whereby payment is required to be made -

(a) in three or more instalments; or

(b) by way of a deposit and two or more instalments;

and ownership of the land is not transferred until payment is completed."

I now proceed to determine whether the sale agreement concluded by the appellant and the respondent was an instalment sale of land.

I am satisfied that it was. Firstly, it was an agreement for the sale of land. Secondly, the agreement provided that payment of the purchase price was to be made by way of a deposit of $500 000.00 and four monthly instalments of $500 000.00. And thirdly, it provided that the property would only be transferred to the respondent after the purchase price had been paid in full. The sale agreement was, therefore, an instalment sale of land as defined in s 2 of the Act.

In the circumstances, before terminating the sale agreement the appellant was obliged to comply with the provisions of subss (1) and (2) of s 8 of the Act. In terms of those provisions, he was obliged to call upon the respondent to pay the instalment within thirty days, and would have been entitled to terminate the agreement only if the respondent failed to pay the instalment within that period.

Although the parties had agreed that if the respondent failed to pay any instalment by the due date it would be given fourteen days within which to remedy the breach before the agreement could be terminated, the period of fourteen days agreed upon is irrelevant. That is so because, in terms of s 8(2)(c) of the Act, if the period agreed upon is shorter than thirty days, the purchaser should be given thirty days within which to remedy the breach, before the agreement can be terminated. On the other hand, if the period agreed upon is longer than thirty days, the purchaser should be called upon to remedy the breach within the period agreed upon, before the agreement is terminated for breach of contract.

In case it may be thought that by agreeing to a period of fourteen days the respondent waived any rights or benefits conferred on it by the Act, it is pertinent to note that in terms of s 11 of the Act any such waiver would be of no force or effect. The section reads as follows:

> "No waiver of any right or benefit conferred by this Act shall be of any force or effect."

In the circumstances, the learned judge in the court *a quo* correctly decided the matter, and the appeal had to be dismissed with costs.

EBRAHIM JA: I agree.

MUCHECHETERE JA: I agree.

Kantor & Immerman, appellant's legal practitioners

V S Nyangulu & Associates, first respondent's legal practitioners