EUGENE KONDONANI CHIMPONDAH
and
TIDINGS CHIMPONDAH
versus
GERALD PASIPAMIRE MUVAMI

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 9 October and 21 November 2007

Opposed Application

R Fitches for the applicants.
P Machaya for the respondents.

MAKARAU JP:

CONDONATION

At the hearing of this matter, the respondent was automatically barred from appearing before the court as he had not filed his heads of argument within the time prescribed in the rules. A formal court application was filed on 4 September, 2007 seeking the up-liftment of the bar. The application was opposed.

After hearing argument from counsel on the application, I granted leave to the respondent to file his heads out of time and indicated that my reason would follow in the main judgment. I now set them out before I proceed to deal with the matter on its merits.

The applicants filed their heads of Argument on 6 June 2007. The heads were served on the respondent's legal practitioners on the following day. It would appear that the respondent's legal practitioners had by then closed the file and archived it at the senior partner's residence. It then took the legal practitioners two months to locate and retrieve the record for the purposes of responding to the heads.

It is trite that there is a certain degree of negligence in failing to observe the rules of the court. An application for condonation such as the one before me is therefore an application for excusing the negligence of the offending party and the degree of such negligence then becomes a factor, together with other factors that will ensure that at the end of the day justice as between the parties prevails. The factors generally, taken into account by the court, when considering an application for condonation, are well established. Importantly, but not exclusively, the court

takes into account such factors as the length of the delay, the explanation for the delay, the merits of the application and any prejudice to the interests of justice generally.

It would appear to me to be the settled practice of this court to consider the same factors when dealing with any application for condonation for the non observance of any time limit to take a formal procedure before the court. Thus, the same consideration have been used when determining an application for condonation for the late filing of an application for the rescission of a default judgment; (see *Ehlers v Standard Chartered Bank Zimbabwe Ltd* 2000 (1) ZLR 136 (HC); to condone the late entering of an appearance to defend; (*Lewis Cox & Co (Pvt) Ltd v Twentydales Service Station (Pvt) Ltd* 1956 R&N 338); to condone a late filing of an application for review, (*Kodzwa v Secretary For Health & Anor* 1999 (1) ZLR 313 (SC) and to condone the late filing of an appeal.

It is from these cases that I derived the considerations applicable in this matter.

In *casu*, while I find that the conduct by the applicant's legal practitioner of closing a file and archiving it simply on the basis that the other party had not taken any further steps to set the matter down in six months borders on the ridiculous, I used the discretion vested in me to allow the late filing of the heads of argument because of the need for the parties to have a final judgment on the matter in view of the spate of litigation that they have already been involved in over the same matter. Further, in my view, the point raised by the respondent in his defence is an interesting and important legal point concerning the definition of installment sales of land under the Contractual Penalties Act [Chapter 9.04].

It is my further view that when considering an application for condonation for the late-observance of a rule of procedure before default judgment is given in the matter, the court should lean towards granting rather than refusing such application. I am however not suggesting that prior to judgment, condonation should be granted for the mere asking. The applicant still has to satisfy the court that there is good cause to excuse the negligence and grant the indulgence.

I now turn to the merits of the matter.

BACKGROUND FACTS

The facts forming the backdrop to this application may be summarized as follows:

In October 2005, the applicants, who are husband and wife, entered into a written agreement of sale with the respondent in respect of certain immovable property in Borrowdale, Harare. The property was sold $4 500 000-00. The purchase price of the property was to be

paid as to a deposit in the sum of $1 million on the date of the agreement and the balance no later than 21 days from the date of the agreement.

The deposit was not paid on the date of the agreement. A sum of $900 000-00 was however paid on 3 November 2005.

Sometime later, the respondent telephoned the applicants and suggested that instead of paying the balance of the purchase price as per the agreement, they propose to him less onerous terms of discharging their obligations. In response, the applicants proposed that they pay the balance in 3 installments, the last one being paid on or before 9 December 2005. The first installment of $1 million fell due on 25 November. It was paid 28 November 2005. The second installment of $1million was due and payable on 2 December 2005. A sum of $600 000-00 was paid to the agent on 5 December 2005 with a request that a sum of $100 000-00 held by the agents in trust be added to make a total of $700 000-00. The balance was to be paid in full on 9 December 2005.

On 6 December 2005, the applicants were informed that the respondent was canceling the agreement of sale. This was acceptable to the applicants on condition the total amount paid to date was all refunded in full. The purchase price could not be refunded upon demand as the money had been invested by the respondent with an asset management company and could not be easily retrieved. Having failed to have the total amount paid to date refunded, the applicants considered that the agreement of sale was thus still binding and on 8 December 2005, they paid the outstanding balance in full. They also paid the transfer fees for the conveyance of title from the respondent to themselves. The respondent refused to effect transfer in favour of the applicants insisting that he had cancelled the agreement on 6 December 2005.

On 31 October 2006, the applicants filed this application seeking an order compelling the respondent to effect transfer of the property to them.

The application was opposed on two main grounds. In *limine*, it was argued that the matter was *res judicata*, having been before this court under case No HC 132/06 a matter that was incorporated into the application before me by reference. Secondly and in terms of the opposing affidavit filed in HC 132 /06, the respondent maintained that his cancellation of the agreement of sale was valid as the applicants had failed to pay the purchase price of the property in terms of the agreement.

I start with the point raised in *limine*.

RES JUDICATA

The requirements for the plea of *res judicata* are settled. Our law recognizes that once a dispute between the same parties has been exhausted by a competent court, it cannot be brought up for adjudication again as there is need for finality in litigation. To allow litigants to plough over the same ground hoping for a different result will have the effect of introducing uncertainty into court decisions and will bring the administration of justice into disrepute.

For the plea to be upheld, the matter must have been finally and definitively dealt with in the prior proceedings. In other words, the judgment raised in the plea as having determined the matter must have put to rest the dispute between the parties by making a finding in law and/or in fact against one of the parties on the substantive issues before the court or on the competence of the parties to bring or defend the proceedings. The cause of action as between the parties must have been extinguished by the judgment.

A judgment founded purely in adjectival law, regulating the manner in which the court is to be approached for the determination of the merits of the matter does not in my view constitute a final and definitive judgment in the matter. It appears to me that such a judgment is merely a simple interlocutory judgment directing the parties on how to approach the court if they wish to have their dispute resolved.

It further appears to me that the judgment by CHATUKUTA J in HC 132/06 was a judgment founded purely in adjectival law and one that did not exhaust the cause of action between the parties. It did not determine whether the applicants were in breach of the agreement of sale or conversely, whether the cancellation of the agreement of sale by the respondent was valid. The rights of the parties in terms of the agreement of sale between them were the broad issue that they brought before the court for determination. The learned judge was of the view that the applicants had not made out a cause of action it their founding affidavit but that this was appearing in the answering affidavit. On that basis, she declined to go into the merits of the matter. In the circumstances of the matter, the learned judge did not therefore exhaust the cause of action between the parties as she could not have exhausted a cause of action that she could not find. In my view, her judgment impliedly directed the applicants to bring a cause of action in their founding affidavits if they wished to have their dispute with the respondent resolved.

On the basis of the foregoing, I would dismiss the plea of *res judicata*.

I now turn to consider whether on the facts of the matter, the respondent was within his rights to cancel the agreement of sale between the applicants and himself.

VALIDITY OF CANCELLATION OF AGREEMENT

In my view, the issue to determine is whether as at 6 December 2005, the applicants were in breach of the agreement of sale and whether such breach entitled the respondent to cancel the agreement of sale without giving the applicants notice to remedy the breach.

The respondent alleges in his papers that he canceled the agreement of sale because the applicants had breached the revised payment plan by failing to pay the installment that was due on 2 December 2005. The applicants accept that they did not pay this installment when it fell due but forwarded the sum of $600 000 -00 to the estate agent on 5 December with a request that the estate agent tops up the amount with a sum of $100 000-00 that it held in trust. The applicants proposed to pay off the balance in full on 9 December 2005 when the last installment of the purchase price was due.

It appears to me to be the common position that the applicants did not pay the installment that fell due on 2 December 2005 on time. The applicants however argue that even if they did not pay this installment on time, the respondent was nevertheless not entitled to cancel the agreement of sale. They have raised one main argument in support of their position.

The applicants argue that once the parties had agreed to vary the terms of payment of the balance of the purchase price, by operation of law, the agreement was governed by the provisions of the Conventional Penalties Act [*Chapter 9.04*] and in terms of s 8 of that Act, the applicants were to be given 30 days notice of the seller's intention to cancel the agreement on account of their breach.

An installment sale of land is defined in s 2 of the Conventional Penalties Act as:

"….a contract for the sale of land whereby payment is required to be made
(a) in three or more installments; or
(b) by way of a deposit and two or more installments;…"

I agree with the submissions by Mr *Machaya* on behalf of the respondent that the parties only agreed to vary one obligation of the applicants and that instead of paying off the purchase price in lump sum, the applicants were now to discharge their obligation in three installments.

In his view, this did not change the nature of the agreement between the parties from a non- installment sale of land to an installment sale of land as provided for in the Act. I am unable to agree with this, the second leg of his submissions.

While the intention of the parties was clearly to enter into an almost cash sale initially, the parties varied the terms relating to the payment of the balance of the purchase price in such a manner as to bring it within the ambit of the Act.

Mr *Machaya* referred me to the remarks by the author Christie in The Law of Contract In South Africa, 3rd Ed at page 466 where the learned author makes a distinction between a subsequent agreement to pay an existing debt by installments and a contract which, as part of the same transaction creates the debt and the method of paying it by installments. I agree with the correctness of the remarks by the learned author and that in a transaction governed by common law, this position will prevail.

However, I am of the view that the provisions of the Act are quite clear and do not admit of two or more meanings. It is my further view that the provisions of the Act apply to afford protection to all purchasers of land where the purchase price is to be paid in two or more installments regardless of when the installments were agreed upon. Thus, where the parties initially agree on a cash sale but later convert it to an installment sale, the initial intention of the parties does not override the clear letter of the law as provided for in the Act. It is yet my further view that the sale does not become an installment sale by reference to the intention of the parties but by operation of law. Once the parties agree that the purchase price is to be paid over in three or more installments, in my view, the provisions of the Act come into operation and the seller has to give the purchaser the notice provided for in s 8 of the Act.

On the basis of the above, it is my view that the protection afforded purchasers of land on installments under the Act is not available to the applicants before me.

It is therefore my finding that the cancellation of the agreement of sale by the respondent in the circumstances was invalid and cannot be upheld and given effect to. The applicants are entitled to the relief that they seek.

In the result, I make the following order:

1. The respondent is ordered to take all necessary steps and to sign all necessary documents to pass transfer to a applicants of Stand 658 Quinnington Township of Subdivision 6 of Quinnington of Borrowdale, within 14 days of the date of this

order failing which the Deputy Sheriff is hereby empowered and authorized to sign all the necessary documents on behalf of the respondent.

2. The respondent is to pay the costs of this application.

Linda Chipato legal practitioners, applicant's legal practitioners.
Chingore & Associates, respondent's legal practitioners.