INNOCENT JOKONYA
versus
JOSEPH KATSANDE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 July 2014 And 6 August 2014

Civil Trial

T. Munodawafa, for the plaintiff
F. Malinga, for the defendant

MATHONSI J: Duly represented by his uncle Solomon Ndoro, the plaintiff, who is based in the United Kingdom, instituted summons action against the defendant seeking an order for the eviction of the defendant and all those claiming occupation through him, from residential premises known as Number 15027 Unit "O" Seke, Chitungwiza ("the premises"), holding over damages of US$70-00 per month from the date of service of summons to date of payment, interest on that amount and costs of suit.

He averred that about October 2009 the parties had entered into an oral sale agreement in terms of which he sold to the defendant, who was a tenant, the said premises for a purchase price of US$5500-00, that amount being payable by a deposit and instalments over a period of 6 months. The defendant paid a total sum of $4 200-00 but in breach of the agreement, he failed to pay the balance of $1 300-00 as a result of which the parties mutually terminated the sale agreement.

The plaintiff averred further that part of the sum of $4 200-00 paid by the defendant would be converted to rentals from October 2009, part of it to off set utility bills which were outstanding during the tenure of the defendant's occupation of the premises and the rest refunded to the defendant. Having refunded that balance, he was entitled to retake possession but despite undertaking to vacate, the defendant had not done so. The plaintiff then sought an eviction order and ancillary relief aforesaid.

Self-acting, the defendant entered appearance to defend and filed a plea on 6 September 2012 which reads in part:

"4. Ad Para 4

The defendant denies that the parties agreed that the balance would be paid over a period of six months and plaintiff is put to the strictest proof hereof.

5. Ad Para 5

The defendant denies that he breached the agreement but he is in the process of paying the balance of US$1300-00.

6. Ad Para 6

The defendant denies they mutually agreed to cancel the agreement of sale and he avers that the agreement is valid and binding.

7. Ad Para 7

Defendant avers that the parties agreed that part of the US$4 200-00 he paid should be converted into rentals and puts plaintiff to the strictest proof hereof (*sic*).

8. Ad Para 8

The defendant denies that they agreed that part of the purchase price be converted to cater for utility bills .

9. Ad Para 9

The defendant denies that there was such an agreement and puts plaintiff to the strictest proof hereof.

10. Ad Para 10

The defendant denies that he was refunded part of the purchase price.

11. Ad para 11

The defendant denies he was/is supposed to vacate the house as his agreement of sale with the plaintiff for the said property is valid and binding".

What I have to decide now is whether the sale agreement was indeed cancelled by mutual consent and whether the defendant should vacate the premises.

Two witnesses, Solomon Ndoro and Ethel Jokonya, testified on behalf of the plaintiff while the defendant gave evidence himself. Ndoro reiterated the contents of the plaintiff's declaration stating that he had acted on behalf of the plaintiff in dealing with the defendant.

Ndoro insisted that the balance of $1 300-00 should have been paid within a period of 6 months and as such the defendant was obliged to pay it by April 2010. He failed to do so, although he and his family had taken occupation of the premises in October 2009. The defendant was then based in Botswana.

As a result of the defendant's inability to pay the balance he and the plaintiff engaged each other and agreed that the agreement be terminated and that part of the money would be converted to rentals given that the defendant had occupied the premises *gratis* from October 2009 while not paying utility bills for water and electricity. The money due in respect of those bills was also to be deducted from what the defendant had paid before he was refunded the balance.

The witness stated that the defendant accepted that and happily arranged for the money to be paid to his wife as he was based in Botswana. True to that, the defendant's wife Grace Katsande, contacted him demanding the refund but the witness insisted that he could only deposit the money into a bank account for record purposes. Grace Katsande duly opened a bank account with Interfin Banking Corporation. She previously did not have one and the witness deposited a total sum of $700-00 into her Interfin Bank Account number 17032 3652 8150 between 9 and 11 March 2011. Ndoro stated that a further sum of $400-00 was sent to Grace by the plaintiff through Western Union Money Transfer bringing the total of the money refunded to $1100-00. All this was done in terms of the defendant's specific instruction He had said the money was needed by his family in Zimbabwe while he remained in Botswana.

Electricity to the premises had been cut off due to non-payment of bills and he paid $1000-00 to off set the arrears. Rent was pegged at $50-00 per month from October 2009. From January 2010 it was pegged at $60-00 per month. This obliterated the money due to the defendant leaving only $1100-00 which was refunded.

Ethel Jokonya corroborated the evidence of Ndoro and added that she had to go to the premises to collect rentals after the sale agreement had been cancelled. She collected rent on one occasion and was given $50-00. In September 2011 after the agreement had been cancelled she had been instrumental in engaging contractors who had erected a 20 metre durawall at the premises. She was acting on behalf of the plaintiff, her brother, and she paid $400-00 for that work done by Star Walling. She produced an invoice to that effect. According to the witness the plaintiff was undertaking the walling because the sale agreement had been mutually terminated.

The defendant, Joseph Katsande, also had something to say. While admitting that the purchase price for the premises was $5500-00 and that he paid $4 200-00 leaving a balance of $1 300-00 which has not been paid to this day, the defendant stated that the agreement is still valid and binding because there was no fixed period for the payment of the purchase price. While not even tendering payment of the balance he still held the plaintiff bound by the agreement denying that the cancellation was mutual.

Katsande agreed that he dealt with the plaintiff through his representative, Ndoro, who was responsible for receiving all the money. He admitted that the plaintiff did erect a durawall at the premises but added that this had been agreed between the parties at the conclusion of the sale agreement because the original durawall had been erected at a wrong place, encroaching onto a neighbouring stand. It was therefore the plaintiff's duty to fix it.

He admitted paying money to Ethel Jokonya but denied that it was for rent. According to him, the money was to go towards the purchase price. While admitting that the sum of $1100-00 was refunded to him through his wife, Katsande denied that this was by agreement insisting that he and his wife had thought that the money was for the repairs to the durawall. However they kept it, did not use it for the durawall repairs and did not return it to the plaintiff either.

He denied that the sale agreement was cancelled although he admitted that the plaintiff had informed him of the cancellation which he did not agree with. He says it came as a result of his refusal to give his car to the plaintiff to clear the balance he had failed to pay. According to him, he is still in the process of buying the premises almost 5 years later and even without paying anything in over 3 years.

In my view this matter resolves itself on those facts which are common cause because sale is basically a contract in which one party, the seller, agrees to exchange his property with the other party, the buyer, in return for a payment of a specified price. See R.H Christe Business Law in Zimbabwe 2nd ed, Juta & Co Ltd at p 141.

It is common cause that in October 2009 the parties agreed to sell each other the premises for $5 500-00 and the defendant took occupation without paying rent on the strength of that sale agreement. It is common cause that the defendant only paid $4 200-00 leaving a balance of $1 300-00 which is still unpaid to this date, almost 5 years on. It is also common cause that for well over 3 years, the defendant has not paid anything towards the purchase price. Instead, he has accepted through his wife, a refund of $1100-00.

To the extent that the purchase price was not paid in full, a fundamental term of the agreement of sale has not been satisfied. That the defendant is unable to pay the balance of the purchase price is evident from his failure not only to pay anything in such a long time, but his inability to even tender payment in his pleadings as well as in his evidence at the trial. More importantly, the acceptance of a refund points to the fact that the parties did agree to mutually terminate the agreement. It is significant that the defendant has not even counter claimed for transfer because he realises that he has not fulfilled his part of the bargain.

Indeed, in assessing the contract of the parties, the court is not interested in the state of mind of the parties considered in abstract but must decide the issue on the state of mind of the parties as manifested by word or deed. A party cannot express mental reservations or unspoken qualifications if these are not consistent with what is said or done. *Levy* v *Banket Holdings (Pvt) Ltd* 1956 R & N 98 (FS) 104-5; *Spring vale Ltd* v *Edwards* 1968 (2) RLR 141 (A) 148-9.

By accepting a refund of part of the purchase price through his wife and pocketing it the defendant was manifesting an acceptance of the cancellation. He can therefore not blow both hot and cold or have his cake and eat it at the same time. In any event, I take the view that it is myopic for the defendant to say that he is still in the process of buying the premises against the background of such facts. No person in the world would allow a buyer the terms which the defendant claims to have. It is unlikely, if not well-nigh impossible that the parties would have agreed on an indefinite payment period. In that regard I embrace the plaintiff's evidence that payment should have been made within 6 months. Even if there was no fixed period, the law provides that payment should be made within a reasonable period of time. I do not regard 5 years to be a reasonable period.

In the circumstances, the defendant breached the agreement by failing to pay the purchase price in full. This entitled the plaintiff to cancellation. The evidence that is common cause, namely that the defendant accepted a refund, also points to the fact that the cancellation of the agreement was mutual. I am therefore satisfied that the plaintiff is entitled to the relief that he seeks.

On the issue of holding over damages, the evidence that was led is that the defendant paid $50-00 per month as rent. Nothing was led to justify the claim for $70-00 monthly rent.

Accordingly it is ordered that:

1. The defendant and all those claiming through him should be evicted from stand No 15027 Unit "O:" Seke, Chitungwiza

2. The defendant shall pay holding over damages of US$50-00 per month from the date of service of summons to date of eviction and interest on that amount at the prescribed rate until payment in full.
3. The defendant shall bear the costs of suit on an ordinary scale

Mavhunga & Associates, plaintiff's legal practitioners
Muronda & Muyangwa, defendant's legal practitioners .