S & B HOLDINGS (PRIVATE) LIMITED
versus
ZAMBUKO PROPERTIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 23 July and 10 October 2018

OPPOSED MATTER

L Uriri, for the applicant
T Mangwaliba, for the respondent

MUNANGATI-MANONGWA J: The applicant is the holder of title of a certain piece of land in the District of Salisbury Called Stand 45A Ardbennie Industrial Township(hereinafter referred to as "the property"). On 27 September 2016, applicant and the respondent entered into an agreement of sale in respect of the property. The terms of the agreement relating to the payment of the purchase price in the sum of US$330 000.00(three hundred and thirty thousand United States Dollars) were as follows:-

i) US$120 000.00 (One hundred and twenty thousand United States Dollars) payment through bank transfer upon signing of the agreement.
ii) 15 undeveloped stands in Mainway Meadows valued at US$118 000.00 being stand numbers 5280, 5327, 5295, 5306, 5307, 5296, 5297, 5298, 5299, 5320,5319,5300, 5881, 5325 and 5305.
iii) Payment of maximum of US$67 000.00 to Banc ABC for the purpose of settling a mortgage bond placed on the property as "soon as they require it or at whatever later date Banc ABC, agrees he can pay it."
iv) US$15000.00to be retained by the respondent for capital gains tax purposes.
v) Payment of US$8500.00 or whatever amount due for rates clearance to be borne by the respondents.

The effective date of the sale was the date of signature thereof.

In terms of Clause 4, the respondent was to be given vacant possession of the property provided he had:-

i) Paid the initial deposit of US$120 000.00 (One hundred and twenty thousand United States Dollars).

ii) Made Banc ABC to release the applicant from being the principal debtor of the current mortgage bond on the property.

iii) Secured a Certificate of Compliance on the 15 stands in Mainway Meadows with the descriptive numbers being 5280, 5327, 5295, 5306, 5307, 5296, 5297, 5298, 5299, 5300, 5320, 5319, 5881, 5325 and 5305 that was to be given to the applicant as part of the purchase price.

Accordingly respondent made the first payment of US$120 000.00 (One Hundred and Twenty Thousand United Stated Dollars).

However, the respondent failed to fulfil all his other obligations in terms of the agreement of the sale.

It is the applicant's case that the respondent's failure constituted a breach of the agreement of sale.

The alleged breaches are as follows;

i) Failure to attend the ZIMRA interview.

ii) Failure to release the applicant from being the principal debtor of current mortgage bond holder in the property.

iii) Failure to furnish the applicant with a certificate of compliance for the aforementioned 15 stands in Mainway Meadows.

The applicant seeks confirmation of the agreement of sale and specific performance of the set obligations by the respondent, and, in the alternative damages in the sum of US$330 000.00 plus interest from date of institution of these proceedings.

The respondent has opposed the relief sought on the basis that the claim is not supported by the terms of the agreement. Further, breach is denied and the respondent contends that the applicant cannot be granted damages to the equivalent of the purchase price of the sold property whilst also retaining the property which is the subject matter of the contract. The respondent seeks penalisation of the applicant by way of costs on a client attorney scale on the basis that the claim is vexatious.

The parties representatives being Mr *Uriri* for the applicant and Mr *Magwaliba* for the respondent seem agreed that three issues lay at the heart of determination of this matter being

i) Whether an effective notice of breach was given as there was no compliance *viz* service on the chosen *docilium citandi et excutandi*.

ii) Whether having notified the respondent of the breach and called upon the respondent to rectify at the risk of cancellation, applicant can insist on specific performance.

iii) Whether specific performance is the appropriate remedy *in casu*.

Whether effective notice of breach was given

The agreement provides the *domicilium citandi et excutandi* for the respondent as No. 10B Sherwood Drive, Waterfalls. It is common cause that the letter of notice dated 4 January 2016 alleging breach was addressed to the respondent's legal practitioners.

The whole idea of having a *domicilium* chosen is to ensure that service is effected where the person choosing the address is saying they will get notice. By choosing a *domicilium* the party commits to an address. The person making the choice cannot then say they did not receive delivery as long as process is effected at the address. In *Loryan (Pty) Ltd* v *Solarsht & Tea and Coffee (Pty) Ltd* 1984 (3) SA 834 W at 847 D-F,MARGO J stated:

> "Service of any process may be effected by delivery or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is to relieve the party causing service of the process from the burden of proving actual receipt . Hence the decisions in which service at a *domicilium* has been held to be good even though the address chosen was vacant ground the party was known to be resident abroad or had abandoned the property, or could not be found." (emphasis added).

Thus the intention of choosing an address for service is to ensure that notice gets to the attention of the party to whom any notice is addressed. *In casu,* the respondent's legal practitioners got served with notice being the letter of 4th January 2017. This letter was duly responded to by the respondent as follows:

> "Further reference is made to your letter dated 4th January 2017, placing our client on notice of breach of various clauses of the Agreement of Sale. Our client has not been able to rectify the said breaches in the prescribed time. Accordingly, our instructions are that your client is free to act as set out in your letter dated 4 January 2017." (My underlining)

The contents are not only an acknowledgement of the letter of notice but go further to provide a substantive answer or response on the issues raised as instructed by respondent. No protest is made that the notice is directed to the wrong party or address, rather respondent instructed its legal representatives to furnish a response which substantively dealt with the

issues raised. Thus it is a fact that applicant's communication on breach reached the attention of the respondent. The court cannot entertain the fallacy that the respondent had no knowledge of the notice when such notice was responded to, given a court can impute knowledge where even service was effected on abandoned property or vacant ground. In the absence of any protest at the time of receipt of the notice that the notice was not proper, the respondent is estopped from claiming so when it had so happily attended or answered to the contents thereof. Accordingly, it is the court's finding that due and proper notice of the breach was rendered.

Whether there was breach of the terms

The letter of 4 January 2017 outlined the alleged breaches. The respondent in a letter dated 23rd January 2017 stated that it was not able to rectify 'the said breaches in the prescribed time,' and, stated that the applicant was free to cancel the agreement. The respondent can therefore not say in the face of a clear admission,"there was no breach." The responded is estopped from denying breach, the breaches were clearly outlined and there was no ambiguity in the manner the breaches were stated. The fact remains that the respondent had not complied with clauses that appear as 4.1.2, 4.1.3, 4.1.4 for whatever reasons it had.

The US$67 000.00 due to Banc ABC was not paid and the respondent avers he could not comply without the assistance from the applicant. No evidence is placed before the court that such assistance was sought. It thus remains a fact that such an obligation was not discharged, and the applicant remains indebted to Banc ABC.

It is puzzling why the respondent would deny breach when it has failed to furnish the applicant with certificates of compliance for the 15 Mainway Meadows stands.

On p 43 at para 11 of the respondent's opposing affidavit, the respondent gives reason for non-compliance as being that the agreement was entered into at the onset of the rainy season hence the subdivisions, roads and sewerage works could not be done. Further, it has no control over the manner the City of Harare which is responsible for approving submitted drawings work. In that regard the respondent states in para 25 at p 47 that:

> "The alleged breach of the certificate of compliance is not within the respondent's control."

This statement on its own is an admission of a breach. It is,therefore, the court's finding that the respondent breached the terms of the contract.

Whether in the circumstances the court can order specific performance

Mr *Magwaliba* for the respondent argued that the applicant was aware that in terms of common law, once there is breach it was entitled to make an election. The applicant chose to effect cancellation hence it cannot claim specific performance. He submitted that there was mutual termination of contract hence it is not open to the applicant to apply for specific performance. The termination came into being when the applicant offered to terminate the contract and the offer was accepted. These submissions need to be ventilated.

The question that comes to mind is whether there was termination. In the court's view the letter of 4th January 2017 did not cancel the contract, the letter carried the intention to cancel, and hence it called upon the respondent to remedy the breach. It could not and is not a letter of cancellation as 14 days were given to the respondent to act. This is even confirmed by the respondent itself when it responded *inter alia* as follows: "Accordingly, our instructions are that your client is free to act as set out in your letter dated 4th January 2017." Rather than cancel the agreement, the applicant wrote another letter to respondent indicating that it was insisting on specific performance. That is the election the applicant made, and followed same by instituting these proceedings. The court finds that the applicant was within its right to do so.

Mr *Magwaliba* sought to argue that clause 15.1 which the applicant relied on in its notice, and upon which it seeks to rely on, is not applicable as it does not relate tothe acts of the alleged breaches which applicant rely on. Clause 15.1 which appears under the default clauses states;

> "15.1Should the purchaser fail to make any payments or commit a breach of any of the conditions hereof and remain in default for a period of 14 (fourteen) days after the dispatch of written notice requiring such payments or the remedying of any such breach, the seller shall be entitled without further notice to either cancel this agreement or insist on specific performance. Provided that where the purchasers fail to comply with clause 4.1, herein and the parties have not agreed on an extension in writing, the seller has the right to cancel the agreement without notice".

Mr *Magwaliba* submitted that as the applicant relies on breaches or non-compliance with clause 4.1.3, 4.14 as read with clause 4.2, the claimed breaches are covered by the second portion of clause 15.1. This portion would entitle the applicant to one remedy, that is terminate the agreement without notice. This is because it specifically relates to non-compliance with clause 4.1 and its sub-paragraphs. Mr *Magwaliba* further submitted that the 14 days' notice by applicant was not necessary where a breach of clause 4.1 was alleged hence the notice is invalid.

The position adopted by Mr *Magwaliba* cannot be correct. Clause 15 is clear "should the purchaser fail to make any payments or commit a breach of any of the conditions and remain

in default" where this happens the seller is free to cancel the agreement or seek specific performance. In the light of breaches by the respondent the applicant was thus entitled to elect to pursue specific performance.

The *proviso* that refers to breaches of clauses under 4:1 states that where parties have not agreed on an extension in writing, the seller has the right to cancel the agreement without notice. (My underlining) That right to cancel does not exclude other options open to the seller. He may choose to exercise the right or not to. Thus cancellation is not the exclusive remedy for breach of clause 4.1. The clause does not operate to exclude other remedies more so when one considers the provisions of clause 15 holistically. In any case the applicant did not proceed to cancel the contract after receiving the respondent's response. Thus the respondent's argument based on the provisions of clause 15.1 is without basis and is discarded without further ado.

It is settled that specific performance is not ordered upon mere asking, it is a matter within the discretion of the court. Van Der Merwe in *Contract General Principles* 4th Edition states at p332 that

> "The court's discretion to refuse specific performance is regarded as a judicial discretion which although it should be as unfettered as possible, must be exercised in accordance with public policy and in such a manner that it does not bring about an unjust result."

Unless if specific performance is impossible,or will produce an unfair result and operate unduly harshly on the respondent, or the debtor is insolvent, serious consideration should be given to fruition of the contract.The respondent ought to satisfy the court that performance is no longer possible.See *Zimbabwe Express Services (Pvt) Ltd* v *Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 366 (S) @ 332 See also *Crispen Hativagone & Another* v *CAG Farms Private Limited & 2 Others* SC42/18, *S. Svosva & Others* v *National Social Security Authority* SC10/16.

No evidence has been brought to the court's attention which implies that specific performance is impossible *in casu*, nor that such an order will cause undue hardship to the respondent or that the respondent is unable to meet the monetary obligations contained in the contract. Neither are any public policy issues at play. The respondent content on relying on the fact that the notice of intention to terminate is ineffective forgot to attend to the material question at hand.

On the issue of the releasing of the applicant from the mortgage obligations by Banc ABC, the respondent rightly alleges that it required the participation of the applicant in engaging Banc ABC due to privity of contract issues. Clause 8.3 refers to a warrant by applicant

to immediately upon the agreement taking effect provide the purchaser without demandwith a written letter to Banc ABC advising them of the sale agreement and that they deal with respondent who would settle the debt. Legally the applicant will remain the recognised debtor although practically the bank would not care who pays up as long as the obligation is discharged.This the applicant can still do. The respondent does not say that it is impossible for it to pay the agreed US$67 000.00 to Banc ABC. The applicant can still comply with clause 8.3 which will enable the respondent to meet its obligation as per clause 4.1.3.

On the issue of securing a certificate of compliance in respect of the stands, the applicant seeks to argue that, the certificate is required in respect of the stands stated in clause 3 (b) and there is no clause 3 (b) in fact the stands are stated in clause 3.3. It is thus argued, in the heads of argument that there was no obligation on the part of the respondent to have obtained the certificate of compliance by 31 December 2016 as clause 4.2 which sets the deadline refers to a non-existent clause. This is a red herring. The only stands for which a certificate of compliance is required are stated in clause 3.3. In any case the respondent in its opposing affidavit acknowledged the obligation to get the certificate of compliance for the 15 stands but averred that it was not possible to service and obtain the certificate by 31 December 2016 due to weather conditions. To then seek to say the origin of this clause "is dubious" is being mischievous. Further, impossibility of performance is as at the time specific performance is sought. The respondent refers to impossibilitybefore this application was made, and most important the existence of the rainy season is not the impossibility contemplated herein. In the court's view "impossibility envisages not temporary prevailing circumstances" but the existence of conditions which make it utterly impossible to perform either now or in future. This is not the position here. Apparently at p 70 a letter from the City of Harare pertaining to the subdivisions which cover the stands in issue carries the diagrams of the stands in issue and the conditions to be met for a certificate of compliance to be issued. The letter is dated 28 July 2017 well after the filing of this court application. If anything, this shows that respondent was pursuing the certificate of compliance even when these proceedings were underway. No evidence has been placed before the court that it is impossible to comply with the obligation of acquiring a certificate of compliance.

Whilst in the letter of demand there is no mention of the failure by the respondent to attend the ZIMRA interview, same appears as an allegation in the applicant's affidavit.

The court agrees with the respondent that clause 4.1.2 places the obligation on the seller to attend ZIMRA interviews. Whilst the respondent has to also attend the interview as a

requirement before the transfer, that obligation is not captured under 4.1.2 and such breach cannot be attributed to respondent at this stage.

The applicant has indicated in its founding affidavit that it is ready, able and willing to perform its obligations in terms of the contract. This includes submitting its documentation to ZIMRA for assessment and attending the requisite interview which it cannot do until full payment of the purchase price is made for the assessment to be done. Applicant has further indicated that it is willing and able to tender possession and effect transfer in terms of the agreement. This it can only do upon the respondent meeting its obligations.

The court is satisfied that no compelling reasons indicative of the impracticality or impossibility of the performance and fulfilment of contractual obligations by the respondent have been presented. Rather, it is the court's opinion that all throughout the proceedings the respondent sought to avoid liability at all costs. This explains why respondent in response to the letter of intent to cancel the agreement urged the applicant to proceed to cancel the contract which of cause applicant did not do. It is not proper for the respondent to seek to benefit from itsown breaches. The learned author Christie, in his book *Business Law in Zimbabwe* at p 575 remarks:

> "So opposed is our law to the idea that breach discharges a contract. In fact that forfeiture clause which state in plain words that a specified breach shall '*ipso facto* cancel and annul' the contract or that the contract 'shall lapse' on such a breach are interpreted as giving the innocent party the right to cancel or enforce the contract at his option, since to give the wording its plain meaning would enable the wrongdoer to profit from his own wrong by committing the specified breach in order to destroy the contract against the wishes of the innocent party."

It is the court's view that the respondent seeks to profit from its own breaches and ensure the demise of the contract. This is even apparent from the defences raised which in the court's view lacked merit but were a desperate attempt to wriggle out of the contract.

This is a case which in the exercise of its discretion the court finds it fair, just and equitable to grant the relief of specific performance. The court does not find it necessary to consider the claim for damages having reached the conclusion that specific performance is the appropriate relief. In any case damages would be appropriately dealt with in a trial where such relief is applicable.

Accordingly the following order is made;

1. The agreement of sale entered into between the parties on the 27th of September 2016 in respect of certain piece of land situated in the district of Salisbury called Stand 45A Ardbennie Industrial Township measuring 6355 square metres held

under Deed of Transfer number 8327/2006 in favour of Applicant be and is hereby confirmed.

2. The Respondent shall render specific performance of its obligations in terms of the agreement of sale within thirty (30) days of the granting of this order.
3. The Applicant shall do all things necessary to enable Respondent to meet the spelt obligations with Banc ABC.
4. Upon the Respondent's full compliance with its obligations as per the sale agreement, the applicant shall render transfer of Stand 45 A Ardbennie Industrial Township measuring 6355 square metres under the Deed of Transfer Number 8327/2006 to the Respondent within thirty (30) days of such full compliance, failure of which the Sheriff is authorised to sign all documents necessary to effect such transfer to the Respondent.
5. Respondent shall pay Applicant's costs of suit.

Chivore Dzingirai Group of Lawyers, applicant's legal practitioners
Hove and Associates, respondent's legal practitioners