Judgment No. SC 70\2002
Civil Appeal No. 391\00

AARON CHITEWE v JOSIAH CHIROODZA

SUPREME COURT OF ZIMBABWE
ZIYAMBI JA, MALABA JA & GWAUNZA AJA
HARARE JULY 4 & OCTOBER 30, 2002

P. Nherere, for the appellant

J. Muganhu, for the respondent

ZIYAMBI JA: On the 13th December 1993, and in terms of a written agreement of sale, the appellant in this matter purchased from the respondent the property known as Lot 5 of Lot 5 of Waterfalls, Induna of Waterfalls (the property) for the sum of $350 000. The purchase price was to be paid by an initial deposit of $150 000 on or before the 31st December 1993 and the balance of $200 000 was payable by monthly instalments of $2 000 (together with interest at the rate of $333,33 per month) commencing the 1st of February, 1994.

The deposit was duly paid and the appellant took occupation of the property with effect from the 1st January 1994. It is common cause that as at the 21st February 1995, no further payment had been made by the appellant and on that date, a letter was addressed by the respondent's legal practitioners to the appellant advising

him that the respondent was exercising his rights as provided by clause 14.1 of the Special Conditions of the agreement of sale and demanding that the full balance outstanding in the sum of $205 999.94 be paid by the 31st August 1995 failing which he would be required to vacate the property.

The appellant's response to this letter was to enclose, in a letter dated 7th August 1995, a cheque for the sum of $38 000 "to bring all the arrears up to date" and to request that the respondent complete certain stop order forms enclosed in the said letter in order to facilitate the payment of future instalments of $2 000. A further letter dated 22nd August 1995, and tendering a cheque in the sum of $38 000 "for the total instalment amounts outstanding plus interest thereon as at 31st August 1995", was addressed to the respondent's legal practitioners by the appellant's legal practitioners. It is common cause that the respondent's legal practitioners refused to accept the cheque and an application for cancellation of the agreement and the eviction of the appellant was brought in the High Court. The matter was referred to trial by GARWE J on the 17th September, 1996.

MUNGWIRA J who presided over the trial found for the respondent and ordered the eviction of the appellant. The appellant's counterclaim for the cost of improvements effected on the property was dismissed. It is against this order that the appellant now appeals.

The first ground of appeal advanced by Mr *Nherere*, who appeared for the appellant, was that on a proper construction of clause 14.1 of the agreement the phrase "full amount then outstanding" meant the unpaid arrear instalments. He submitted, that had the parties intended the phrase in question to mean the balance of

the purchase price, they would have said so. Accordingly, the whole of the balance of the purchase price had not become due as at the 31st August 1995 and the respondent was not entitled to cancel the contract. This argument was advanced before the learned Judge who dealt with it thus:-

> "I do not believe there to be merit in the argument submitted by the defendant. It is to me patently clear from the language used that the words the "full amount then outstanding" relates to the balance of the purchase price. I cannot in the circumstances of this case perceive of a situation where the parties agreed that the defendant could at his election at any time default in his payments and be afforded the opportunity to, after the expiry of a combined eighteen month period, at his election then determine to pay the outstanding instalments. It cannot, in my view, have been the parties' intention that the defendant could perpetuate an arrangement whereby he could effect his payments on an indefinite basis. The result would be absurd.
>
> Another cogent factor is that the defendant had to arrange finance within that period. What was clearly envisaged there was not finance with which to pay arrear instalments but finance to pay the full amount then outstanding plus interest up to the date of payment. The plaintiff makes the salient point that even if there is the averment that the plaintiff's initial correspondence referred only to the commencement and expiry date of the 'first phase and second phase' and the dishonoured cheque, the letter emanating from his legal practitioners in February 1995 made specific demand for payment of the sum of $205 999.94 by 31 August 1995 failing which the agreement would be terminated and eviction would ensue. Despite acknowledgement of receipt of the letter the defendant did not take issue with or protest the contents of the letter. He made no efforts to resolve the matter. Save to advise in February 1995 the plaintiff's legal practitioner that the matter was receiving his attention, the defendant maintained silence before unilaterally seeking to pay $38 000 which represented 19 months of instalments which he had neglected to pay.
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> Had the defendant truly and honestly harboured the belief that the correct interpretation to be placed on the agreement was that which he sought to persuade this court to accept, one would have expected him at the very least to have queried the demand for payment of the balance outstanding on the purchase price.
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> I would in the circumstances agree with the submission by the plaintiff that to hold that the phrase 'the full amount then outstanding' means arrear instalments unpaid over the 15 month period is to do unnecessary violence to the otherwise unambiguous language employed in drafting the agreement.
>
> In the result the defendant had on a proper construction of clause 14.1 fifteen months within which to apply for and obtain a loan with which to pay the

> plaintiff the outstanding $200 000 plus interest at the fixed rate. It is common cause that he failed to do so. This breach entitled the applicant to cancel the agreement."

I respectfully agree with the view expressed by the learned judge. The appellant's defence is clearly without merit. He is merely clutching at straws. One cannot look beyond the ordinary meaning of the words which is that the full balance outstanding on the purchase price is what was envisaged by the parties in clause 14 of the agreement.

I turn to consider the second ground of appeal advanced by Mr *Nherere*, namely, that even if the respondent was correct in his interpretation of clause 14.1 of the agreement, the purported cancellation was invalid for want of compliance with s.8 of the Contractual Penalties Act, [Chapter 8:04] (The Act). S 8 of the Act provides:-

> "8. (1) No seller under an instalment sale of land may, on account of any breach of contract by the purchaser –
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> (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.
>
> (2) 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 of the instalment sale of the land concerned; or

(ii) thirty days;

whichever is the longer period…"

The point taken on behalf of the appellant was that the respondent purported to cancel the agreement without first giving notice calling upon the appellant to remedy his breach. The letter of the 21 February 1995 did not, it was submitted, constitute such a notice since the breach complained of therein was failure to pay instalments and that was the very breach which the appellant sought to remedy on the 22 August 1995 by the tender of payment of $38 000. This argument is, in my view, untenable. The relevant portion of the letter under mention reads as follows:-

"As you are well aware you have not met any instalments since the 1st of February, 1994, which means that your instalments are in fact 12 months in arrears. Our client finds this position unacceptable and we are instructed to advise you that he will be exercising his rights provided by the special conditions under annexure 'B' of the aforementioned Deed of Sale. We set out the special condition below:-

14.1 In the event of the purchaser failing to effect any payment due hereunder within three months of the due date thereof, he shall automatically be allowed a further 15 (fifteen) months in which he should arrange finance for the settlement of the full amount then outstanding plus interest to date. Failure to do so would render the agreement of sale null and void in which case any amounts paid to the seller in the form of the deposit or instalments shall be forfeited to the seller and the property shall revert back to the seller with immediate effect without any recourse to any court of law, and in this event the purchaser shall vacate property with immediate effect.

In light of the above-mentioned special condition you have until the 31st August, 1995, in which to arrange finance for the settlement of the full amount outstanding. Please note that on the 31st August, 1995 the amount

> outstanding will be $205 999,94. This amount being the capital outstanding plus the fixed interest as agreed.
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> Please note our client will not accept payment of the balance of the purchase price by instalments and we therefore advise you that unless you are able to raise the aforementioned sum by the 31st August 1995 you shall be asked to vacate the property which shall revert back to our client with immediate effect and further to this you shall lose your deposit of $150 000.00"

In terms of the above quoted clause of the agreement, in the event of a failure to make any payment within 3 months of the date on which it fell due, the appellant automatically had 15 months within which to obtain finance for the balance outstanding failing which the agreement would become null and void. Thus it was a breach of the conditions of payment which would trigger the operation of the second stage namely the sourcing of finance to settle the balance of the purchase price.

The letter under mention clearly advised the appellant that he had breached the terms of the agreement and that the respondent would be exercising his right to receive settlement of the full amount outstanding as provided in terms of clause 14.1. of the special conditions of the contract. It also set out the manner in which the appellant was to remedy the breach, namely, by arranging finance for the settlement of the full amount outstanding which amount with interest to the 31st August, 1995, was calculated to be $205 999.94. By neglecting to obtain finance for the settlement of the purchase price as advised in the said letter, the appellant failed to remedy the breach at his own peril. Accordingly, the sale was validly cancelled.

The final submission advanced on behalf of the appellant was that, in the event that it is found that the sale was validly cancelled, the appellant is entitled to

compensation for improvements in the sum of $64 531.03 being the proven costs of improvements effected by the appellant on the property.

The appellant counter-claimed for $307 000 being the value by which he said that the property had appreciated by reason of the improvements which he had effected on it. The learned judge found that:-

> " … the observation by Mr Muganhu that the defendant's claim for payment of $307 000, being the amount by which the plaintiff's property has appreciated in value due to improvements effected by him is not based on the actual cost of labour and materials and is not supported by expert evidence as to the effect if any that the improvements had on the value of the property in question is in accord with my own views. No basis has been established upon which this court can make a finding that the plaintiff's property has appreciated in value solely due to any improvements that the defendant may have effected."

With regard to the cost of the improvements effected, the learned judge found:-

> "There can however be no doubt that the defendant did effect repairs and improvements. He cannot, on the evidence before this court however, be heard to state that he when he entered into the agreement was unaware of the condition of the house, swimming pool and the workers' quarters. He had the opportunity to inspect the property and did in fact inspect the premises on several occasions prior to his decision to purchase. According to the plaintiff's evidence he visited the premises on several occasions between 1991 and 1993 when the agreement of sale was concluded. The defects he referred to were not latent defects except for perhaps the leak in the roof but in respect of this particular defect he did not lead evidence of substance as to his expenditure in attending (to) the particular problem. None of the documents in exhibit 1 were in his evidence linked to the work he carried out in respect of the alleged roof leak.
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> There is no evidence of any misrepresentation on the part of the plaintiff. There is in fact no evidence upon which the protection of the *voetstoots* clause can be nullified. In clause 6.4 of the agreement the defendant acknowledged that he had inspected the property and was satisfied as to the nature and condition thereof."

The learned judge also considered the appellant's claim in the light of section 9 of the Act. At page 183 of the record she observed:-

> "This being an instalment sale of land this court must therefore consider the defendant's claim for compensation for improvements in light of the provisions of section 9 of the Act which section provides:-
>
> > '9(1) Whereupon the cancellation of the termination of an instalment sale of land the purchaser is required, in terms of the contract to forfeit –
> >
> > (a) The whole or any part of any instalment or deposit which he has paid to the seller; or
> >
> > (b) any claim for any expenditure he has incurred –
> >
> > (i) whether with or without the seller's consent, in protecting or preserving the land or in paying rates or taxes relating to the land; or
> >
> > (ii) with the seller's consent, where the expenditure has enhanced the value of the land,
>
> and it appears to a competent court that such forfeiture is out of proportion to the prejudice suffered by the seller, the court may grant such relief as it considers will be fair and just to the parties.'"

The court is empowered by this section to grant such relief as it considers will be fair and just to the parties if it appears that the forfeiture is out of proportion to the prejudice suffered by the seller. In the present matter the issue of the forfeiture of the deposit did not fall to be determined by the court *a quo* as the parties were agreed that the deposit would be refunded less $2 000 per month for every month that the respondent was in occupation of the property.

With regard to the forfeiture of the improvements made, the issue which fell to be decided by the trial court was whether the penalty was unconscionable. The following factors were taken into account by the learned judge in arriving at the conclusion that the penalty was not out of proportion to the prejudice to the seller:

a. the defendant made no payment of the instalments in terms of the agreement for almost eighteen months after the date of signature of the contract;

b. in May 1994 he attempted to make payment of one instalment. The cheque was dishonoured;

c. in February 1995 demand was made of him for the full amount outstanding by the 31st August 1995 but he took no steps to raise the finance for the purchase of the property;

d. there was no averment by the appellant that the expenditure incurred on the property was for "protecting or preserving the land or in paying rates or taxes relating to the land" and it did not appear from the invoices produced in evidence by the appellant, that the expenditure was incurred in respect of necessary expenses;

e. the improvements allegedly carried out were not proved to have been effected with the seller's consent;

f. the appellant had benefited from residing on the property on the premises for 6 years without any escalations.

Taking all these factors into account, the learned judge was satisfied that the appellant was not entitled to compensation in respect of the improvements.

I find no fault with the reasoning of the learned judge. Indeed it seems to me almost immoral that the appellant, having lived on the property for 6 years without making any attempt to pay the purchase price thereof, should be allowed to claim for minor improvements made to the property for his own benefit. Bearing in mind the escalation of property prices over the said period, the appellant undoubtedly benefited greatly from a rental of $2 000 per month without escalations. This ground of appeal is, therefore, also devoid of merit.

The appeal is accordingly dismissed with costs.

MALABA JA: I agree

GWAUNZA AJA: I agree

Mugabe & Partners, appellant's legal practitioners

Musunga & Associates, respondent's legal practitioners