THAKOR RANCHOD KEWADA (N.O)

versus

UNITED HARVEST (PVT) LTD

and

THE MASTER OF THE HIGH COURT (N.O)

HIGH COURT OF ZIMBABWE

CHIRAWU-MUGOMBA J

HARARE, 13 SEPTEMBER 2022

OPPOSED APPLICATION

G. Gapu, for the applicant

E.T Muhlekiwa, for the respondents

CHIRAWU-MUGOMBA J: [1]. On the 13th of September 2022, after hearing this matter I gave judgment *ex tempore,* as follows.

(1) The agreement of sale between the late John Vigo Naested entered into on the 12th of August 2020 in respect of a property known as Lot 18 Gardiner East of Gardiner situated in the district of Goromonzi held under deed of transfer no. 6791/2018 otherwise known as 18 Gardiner Road, Goromonzi be and is hereby cancelled.

(2) (a) The 1st respondent and all those claiming title through it shall vacate the property described in paragraph 1 of this order within a period of seven (7) days of being served with this order.

(b). Should the 1st respondent and all those claiming title through it fail, refuse or neglect to vacate the said property within the stipulated period, the Sheriff of the High Court be and is hereby authorised to evict them.

3. The 1st respondent shall pay costs of suit.

COUNTER APPLICATION

1. The Estate of the Late John Vigo Naested be and is hereby ordered to refund the `1st respondent the sum of US$200 955.51 and 2nd respondent is directed to accept that amount as a claim against the Estate the late John Vigo Naested DR no. 5089/21.

2. The 1st respondent shall pay costs of suit.

[2] The 1st respondent is the executor in the estate of the late John Vigo Naested who passed away on the 8th of May 2021 (hereafter the deceased). It is trite that a deceased estate is represented by its executor, see *Klepman vs Law Union and Rock Insurance,* 1957(1) SA 506. In that capacity, he applies for the ejectment of the 1sst respondent from a property called Lot 18 Gardiner East of Gardiner situated in the district of Goromonzi held under deed of transfer no. 6791/2018 otherwise known as 18 Gardiner Road, Goromonzi (hereinafter the property) which is registered in the name of the deceased.

[3] The deceased and the 1st respondent on the 12th of August 2020 entered into an agreement of sale in respect of the property. The purchase price was the sum of US$400 000 (four hundred thousand United States Dollars) payable in instalments for the period 12 August 2020 to 31 March 2021. The 1st respondent according to the agreement would take occupation on the 1st of August 2022 and this has since taken place.

[4] The 1st respondent failed to pay the purchase price in accordance with the agreement. On the 21st of December 2021, it proposed a restructuring of the payment but failed to honour its own proposal.

[5] On the 15th of March 2021, following discussions, the 1st respondent proposed to pay the sum of US$15 000 per month. On the 16th of March 2021, the deceased accepted the proposal through his legal practitioners in writing. The 1st respondent however failed to honour this proposal and accordingly, the full purchase price became due and payable in full. As at the 12th of August 2021, the 1st respondent had paid the sum of US$200 955.49 leaving a balance of US$199 044.51. Thereafter a notice was sent to the 1st respondent remining it of the need to pay the balance of the purchase price.

[6]. No payment was forthcoming and on the 28th of February 2022, the applicant cancelled the agreement of sale. On the 28th of March 2022, notice to vacate the premises was given to the 1st respondent but to no avail. The applicant undertook to settle the sum paid by the 1st respondent in accordance with processes on winding up of estates.

[7]. The 1st respondent filed its notice of opposition and opposing affidavit and stated as follows. Part payment of the purchase price was made. Upon taking occupation, some improvements were effected in the sum of US$11 000. Payments were affected by recession due to the impact of COVID 19.

[8] 1st respondent admitted that it made an offer to pay instalments of US$15000 per month of the 15th of March 2021 and this was accepted by the applicant on the 16th thus novating the agreement of the 12th of August 2020.

[9] It was not a term of the agreement that upon failure to pay on instalment, the balance due would become payable. Rather, what became payable is the balance of the instalment. The deceased passed away on the 8th of May 2021 and the applicant was only appointed on the 17th of December 2021 and he could therefore only demand payment from his date of appointment.

[10]. The cancellation of the agreement was as a result illegal. What was cancelled was the 12th August 2020 agreement instead of the novated agreement.

[11] The 1st respondent also filed what it termed, 'court application in terms of *s9(2)* of the Contractual Penalties Act, [*Chapter 8:04*] essentially a counter application in terms of *R58(8)* of the High Court Rules, 2021. The first respondent stated that it is an application for a refund of the purchase price it paid for the property. The founding affidavit by one Emmah Chishakwe is essentially more like the opposing affidavit to the main application. The first respondent contends that if the court is in agreement with the cancellation, the first respondent ought to be refunded the money it paid and additionally the US$11000 it spent on improvements. First respondent also sought an order that the property be declared to be especially executable.

[12] The applicant, in response raised three points in *limine*. (1) That the procedure of an 'applicant in reconvention' does not exist at law, that the counter application shows that the

first respond accepts the cancellation and (3) that the application is unnecessary given that the applicant has accepted and tendered a refund of the purchase price paid.

[13] At the hearing, I dealt with the main application first. In addition to the heads of argument, Mr Gapu made the following submissions. That it is common cause that the first respondent breached the agreement of sale between the parties by failing to pay the purchase price. The first respondent then requested the applicant for an extension of time within which to pay and the request was granted. The main clause in the agreement deals with the payment of the purchase price in clauses 1 and 2. Those are the only clauses which were amended. The breach clause is a standalone one and hence the amendment done had no effect on this clause. That is where the first respondent falls into error by stating that the entire agreement was novated. Based on case authorities, novation is not lightly inferred and it is different from a mere variation of the agreement. The party who alleges novation must show conclusive proof that the agreement relied on was novated. As for the purchase price already paid, the first respondent will be paid by the applicant with other creditors in accordance with the laws on winding up of deceased estates.

[14]. Mr Mhlekiwa, for the 1st respondent submitted as follows. The character of the agreement between the parties is such that besides the payment clause, there is the occupation date, the *voetstoots* clause, insurance, transfer and occupation clause. The deceased and the first respondent agreed that the latter will take occupation on the 1st of August 2020. There was nothing much in light of the agreement of the 16th of March 2021 when parties re-negotiated and agreed on payment of $15 000 per month. There was nothing further that could be amended from the initial one. Therefore, there are two agreements entered into by the parties. The first is the written agreement and the second is the one of the 16th of March 2021. The only term that could be amended is that of payment since the first respondent had already taken occupation by the 16th of March 2021. The amendment is not a variation but a novation. The first respondent did not honour the novated payment schedule because the deceased passed away shortly after the novation. Some payments were made to the deceased's son but not $15 000 per month. The applicant ought to have cancelled the latter and not the first agreement and since the agreement was in instalments, what became due was the balance of the instalments and not the whole balance.

[15] For the counter application, Mr Mhlekiwa, abandoned the claim for US$11, 000 for improvements effected. Both practitioners submitted that they were abiding by the heads of argument. Mr Gapu had in the main matter abandoned the point in *limine* on the nature of the application. The other issues raised in my view dealt with the merits.

[16] It is common cause that the deceased and the first respondent entered into an agreement of sale dated the 12th of August 2020. In terms of that agreement, the first respondent was to pay the amount of US$400 000 in instalments starting with a deposit of $150 000. It is recorded that on the date of signing, the first respondent had paid US$50 000. By way of a letter dated the 21st of December 2020, the first respondent informed the applicant that there were facing challenges and had fallen behind in payments in the sum of US$53544.52. They proposed monthly instalments of US$15 000 from 31 December 2020 up to January 2021 and a final payment of $13 554 in March 2021. Its apparent that they wanted to state 2021 and 2022 instead of 2020 and 2021. The 1st respondent failed to pay this amount according to the applicant and this was admitted by the first respondent. Another proposal was made via email to the applicant's erstwhile legal practitioners on the 15th of March 2021. This was accepted by the applicant via its legal practitioners as per annexure 'e'. A letter was sent to the applicant dated the 19th of January 2022 reminding the first respondent to pay as per its undertaking. The first respondent did not make any payments to the applicant thus breaching the agreement.

[16] Where the parties differ is whether or not the agreement was novated or varied and the consequences thereof. The applicant contends that once there was breach, the whole balance became due and payable whilst on the other hand, the first respondent contends that what should be claimed is the outstanding instalments. Those are the legal issues that the court will deal with. Nothing much turns on the counter application because once the main application is disposed of, this will have a bearing on it. Moreover, the applicant has not refused to pay the purchase price already paid and the first respondent has abandoned the claim for US$11000 damages.

[17] In dealing with novation in the matter of *Chiswa vs Car Rental Services and Another*, SC- 74-20, the court had this to say.

"In *Mupotola v Southern African Development Community* SC 7/06 ZIYAMBI JA made the following pertinent remarks regarding novation on p 5 of the judgment:

> *"Novation means replacing an existing obligation by a new one, the existing obligation being thereby discharged. See The Law of Contract in South Africa Third Ed by R.H Christie at p498.*
>
> *The above definition presupposes that both the existing obligation and the new one arise out of valid contracts. "When parties novate they intend to replace a valid contract by another valid contract." See Swadif (Pvt) Ltd v Dyke 1978(1) SA 928 (A) at 940 quoted by Christie in the Law of Contract in South Africa, supra*."

See also *FBC Bank Limited vs Hwenga and ors,* HH225/16 and *Funding Initiatives International (pvt) Ltd vs Mabaudi,* HH-20-07 cited in the applicant's heads of argument.

[18]. In Swadif v Dyke 1978 (1) SA 928 (A) at 944G Trengove AJA at 940G said that:

> "In our law there are two forms of novation, namely *novatio voluntaria* and *novatio necesaaria. Novatio voluntaria,* voluntary *novation,* has its origin in contract. Novation, in this sense, is essentially a matter of intention and *consensus.* When parties novate, they intend to replace a valid contract by another valid contract (Wessels, Law of Contract in S.A., 2nd ed., vol.2. paras.2370-2379; Caney, op.cit., 2; Acacia Mines Ltd v Boshofff, 1958 (4) SA 330 (AD) at p337; Trust Bank of Africa Ltd v Dhooma, 1970 (3) SA 304 (N) at 307). *Novatio necessaria,* compulsory novation, on the other hand, takes place by operation of law; it arises out of judicial proceedings between the parties whose rights and obligations are in issue betweent hem (Caney, op. cit., pp2-3). Wessels, *op. cit.,* para2370, points out that although the two forms of novation had a common origin in the early days of Roman law, they are at present juridically quite distinct. Although a judgment was regarded as a form of novation under Roman-Dutch law, it appears to have been generally accepted that its consequences differed materially from those of a voluntary novation. De Groot, *Inleiding,* 3.43, deals with this subject in very general terms. After stating in 3.43.1 that

"*novation takes place where an obligation takes place where an obligation is released upon the terms that simultaneously another obligation takes its place*."

In *casu,* the issue of the validity of the agreement of sale does not arise.

[19]. Tauber v Von Abo 1984 (4) SA 482 (ECD) at 485C, the court stated as follows.

> "Novation can be described as the replacing of an existing obligation by a new one, the existing obligation being discharged by the new obligation. Cf. Caney, The *Law of Novation…* Wessels The Law of Contract in South Africa 2nd ed vol 2 paras 2369, 2375, 2379 and 2395; De Wet and Yeats 4th ed at 239."

[20]. Wessels, cited extensively in the applicant's heads of argument when distinguishing between novation and variation states as follows in *The law of contract in South Africa*, 2nd ed, vol 2 @paragraph 2395,

> "If a contract has been established between two parties, there is nothing to prevent them from modifying its terms by later agreements. In such a case, the parties intend the existing contract to retain its legal effect, but in the modified form agreed upon, "*sed anteriora stare, et posteria incrementum illis acedere".* On the other hand, the parties may intend to do away with the existing contract altogether and to replace it by a new one. If this intention is quite clear, the new contract takes the place of and extinguishes the old. In the former case, there is no intention to novate, in the latter case there is".

[21] I do not agree with Mr Muhlekiwa, that there was novation. In my view, there was variation of the contract in relation to payment of the purchase price. As a matter of fact, there were two variations. The first one being that of the 21st of December 2020 when the first respondent wrote a letter to the deceased proposing a time frame to repay having faced challenges. The applicant can be taken to have acquiesced to this variation by estoppel. The second more specific variation was of the 15th of March 2021 that the deceased specifically accepted on the 16th of March 2021.

[22] What this means is that the agreement of the 12th of August 2020 is the one that was modified regarding payment. The rest of the agreement remained intact. The breach occurred when the first respondent failed to pay the US$15 000 as per its own undertaking.

[23]. Mr Muhlekiwa submitted that when breach occurred, what was outstanding was that particular instalment. As stated above, all other clauses of the agreement except the payment period remained intact. The agreement of the 12th of August 2020 contains a clause on breach. The relevant portion reads, *"In the event of such non-payment or breach, the full balance of the purchase price shall immediately become due and payable.* The applicant cannot be faulted for cancelling the agreement having given adequate notice as per the breach clause. Infact the first respondent was given some indulgences but these did not take away the right of the applicant to cancel the agreement. The notice also fell squarely within the provisions of the Contractual Penalties Act [*Chapter 8:04*] in particular SS 8(1) (2).

[24] The first respondent having abandoned the claim for US$11 000 as damages, nothing much turns on the counter application. I agree with Mr Gapu that the counter application ought not to have been filed since the applicant had already undertaken to repay the sum paid by the first respondent towards the purchase price.

[25] I note that the first respondent has sought in its draft order that the property be declared executable. However, it is now estate property and must proceed as such where a claim is lodged against the estate. I also note that the time frame for lodging of claims may have expired and will therefore grant an order that the estate of the deceased accepts the claim.

[26] On costs, it is clear that the first respondent ought not to have filed it and in any event the claim for damages was abandoned. I will therefore order that the first respondent also pays costs for the counter application.

Scanlen and Holderness, Applicant's legal practitioners.
Muhlekiwa legal Practice, 1st Respondent's legal practitioners