UNITED APPIARIES (PRIVATE) LIMITED
versus
PENTECOSTAL FELLOWSHIP CHURCH
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 6, 9 & 30 May 2013

Civil trial - waiver

K Musimwa, for the Plaintiff
D C Ngwerume, for the Defendant

MAFUSIRE J: The plaintiff's claim was for specific performance. In terms of a written agreement of sale on 1 February 2001 the plaintiff bought from the defendant Stand 644 Marimba Park Township, measuring 6820 m^2 (hereafter referred to as "**the property**"). The purchase price was $950 000. It was payable by a cash deposit of $450 000 and monthly instalments of $20 000 commencing on 28 February 2001. A bank account was provided into which the instalments would be deposited. The wording of the agreement of sale regarding instalment payments was as follows:

> "Balance to be paid by monthly instalments of $20 000.00 (Twenty thousand dollars) with effect from 29th of February for over 2 years. In A/C No. 20522003 First Bank Nelson Mandela Avenue Harare in the name of Gawe Walter Masawi."

Thus, despite the poor drafting it is evident that the instalments would be spread over two years.

The payment of the deposit was split into two: $150 000 on the signing of the agreement, and the balance, $300 000, by 2 April 2001. The agreement had the usual non-prejudice and breach clauses. The whole case was centred on them. These clauses read as follows:

> "The rights of the seller under this agreement shall not in any way be prejudiced by any extension of time or any other indulgence or concession which the seller may grant to the purchaser in respect of performance of any of the purchaser's obligations under this agreement.

> Notwithstanding anything to the contrary hereinafter contained the seller shall in the event of the purchaser failing to pay any sum owing under this agreement on the due date or in the event of any breach of any other condition of this agreement of sale not being remedied within 31 days of the posting of a written notice to the purchaser enquiring [sic] the purchaser to do so, notwithstanding any previous indulgences or concessions given by the seller to the purchaser, the seller shall be entitled forthwith to cancel and terminate this agreement of sale, in which event the seller shall have the option to institute legal proceedings against the purchaser, and in which case the seller shall only refund the sum of moneys that the purchaser will have paid on that date, without any interest, and having found an alternative buyer."

In November 2003 the plaintiff, without legal representation, instituted proceedings by way of a court application seeking, in the main, the order of specific performance. The claim was based on the allegation that despite the plaintiff having paid the purchase price in full the defendant was refusing to pass transfer. The defendant, also without representation, opposed the claim. It alleged that it had since cancelled the agreement of sale allegedly following plaintiff's breach. The breach was said to have been the plaintiff's alleged failure to maintain the instalments at the agreed rate of $20 000 per month for some period of time. It was also said that there still remained an unpaid balance on the purchase price.

Eventually both parties engaged legal representation. At the pre-trial conference the matter was converted into an action. Subsequently the parties filed a declaration and a plea. Those pleadings essentially repeated the parties' versions in the court application.

At the trial before me the crux of the matter was whether or not the plaintiff had breached the agreement of sale and whether or not the defendant had properly cancelled it. The onus was on the plaintiff to prove its entitlement to the order of specific performance.

Both parties gave evidence. The plaintiff's witness was one Charles Munzara. He was the chairman of the plaintiff's board of directors. The defendant's witness was one Reverend Walter Masawi Gawe. He was now retired. These witnesses had been the main actors in the execution and performance of the agreement on behalf of their respective organisations. There was much convergence in their evidence. Much of the facts were common cause. The major point of divergence was mainly in the interpretation of some of the clauses of the agreement of sale and on the meanings to be ascribed to certain of their conduct. This shall become apparent in my judgment.

Mr Munzara said that the plaintiff had paid the full purchase price of $950 000 within the time prescribed. Rev Gawe denied it. He claimed that there still remained a balance

outstanding. In the defendant's plea it was alleged that the last payment by the plaintiff had been in October 2002 and that the plaintiff's total payments had only amounted to $620 000. However, during trial Rev Gawe claimed that the plaintiff's total payments were $860 000. Quizzed on this difference Rev Gawe became incoherent. The cross-examination on that point went something like this:

"Q How much did you receive?

A If we add up the figures they have paid $860 000 out of $950 000 and so there is a balance of $70 000.

Q You filed a plea on 14 February 2013 in which you mentioned that you received $620 000 in total. How do you reconcile the two?

A I am talking about the number of receipts, whenever they made payment.

Q You have said that you received $860 000 and that the last payment was in October…

A We made the amounts from the receipts

Q So where did you get the $620 000 – look at your plea wherein you said you had received $620 000 by the last payment in October but today you are saying payments amount to $860 000. Where is this coming from?

A The figure is after all the reconciliation of all the receipts"

After all the evidence had been led I was satisfied that the plaintiff had paid the full purchase price within the time prescribed. Amongst the plaintiff's bundle of documents was a list of the payments that it had made. It showed payments starting from 17 February 2001 in the amount of $150 000 aforesaid. The payments ended on 8 November 2002 with the sum of $68 000. Almost all those payments were supported by bank documents in the form of cheque voucher images. Furthermore, there were receipts of payments issued by the defendant to the plaintiff.

Even though the bank documents and the receipts did not exactly add up to $950 000, the gap was easily filled in by the evidence of both parties. For example, by a letter dated 3 May 2002 to the plaintiff the defendant had purported to cancel the agreement of sale "for the drop of monthly instalment (*sic*) from ($20 000-00) twenty thousand dollar (*sic*) to only (12 600) (*sic*) twelve thousand dollars per month without any explanation at all". In that letter the defendant had expressly and unequivocally acknowledged having received from the plaintiff

payments totalling $503 100 as at the end of August 2002. It then transpired in both Mr Munzara's evidence-in-chief and in the cross-examination of Rev Gawe that after August 2002 the plaintiff had made further payments which the defendant had acknowledged and had either issued receipts for or had promised to do so afterwards.

In his evidence Mr Munzara said that after the defendant's purported cancellation the plaintiff had made three further payments. The first two had been by cheques in the sums of $240 000 and $137 000 in September 2002 and October 2002 respectively. The last had been by a cheque from an entity called Catercraft. It had been in the sum of $68 000. Mr Munzara explained that ten of the plaintiff's members had been at that time employees of Catercraft. Each one of them had had to contribute $7 000 in order to clear the balance of the purchase price which, at that time, stood at $70 000. Nine of the members had managed to raise their full portions. The tenth member had only managed $8 000. They had all paid their respective portions to Catercraft. Those contributions had amounted to $68 000. Catercraft had in turn issued a single cheque for $68 000 in favour of Rev Gawe. Mr Munzara said the shortfall of $2 000 had been paid to Rev Gawe in cash.

At the time of trial the plaintiff had neither the cheque voucher from Catercraft nor any receipts from the defendant on the sums of $68 000 and $2 000. Mr Munzara explained that when he had gone to collect such evidence in readiness for the trial Catercraft had said that they maintained such records for six years only after which they destroyed them.

The defendant tried to capitalise on the absence of documents on the balance of $70 000 aforesaid. However, it was during the cross-examination of Rev Gawe that it became apparent that either his memory was failing him or that he was just being insincere. In a letter dated 26 December 2002 to Mr Munzara Rev Gawe had acknowledged that after his purported cancellation in May 2002 the plaintiff *"... had directed three other cheques through me*." This neatly dovetailed with Mr Munzara's assertion that after the defendant's purported cancellation in May 2002 they had paid the aforesaid two cheques in the sums of $240 000 in September 2002 and $137 000 in October 2001, and the third cheque from Catercraft in the sum of $68 000 in November 2002. Thus if, as acknowledged by the defendant in writing that by May 2002 the plaintiff had paid $503 100, and if subsequently the plaintiff had paid $240 000, $137 000 and $70 000 – the last payment being the $68 0000 cheque from Catercraft and the $2 000 in cash – then the plaintiff's total payments by 8 November 2002 would be $950 000.

As pointed out already, the plaintiff had 2 years from 1 February 2001 to pay off the instalments. Thus it had until 31 January 2003 to finish paying. But by 8 November 2002 the plaintiff had already finished paying. Therefore on the two questions whether the plaintiff had failed to pay the purchase price in full and whether, at any rate, the payments had been made within the stipulated time, I find for the plaintiff.

The defendant steadfastly maintained that it had cancelled the agreement of sale on account of the plaintiff's "*unexplained*" failure to maintain the instalments at $20 000 per month for some months. That the plaintiff did not always maintain its rate of payments as per the agreement was common cause. For example, in terms of the agreement the deposit was supposed to be $450 000. It was supposed to be paid in tranches: $150 000 on 1 February 2001 and $300 000 by 2 April 2001. But on the ground the parties behaved completely differently right from the onset. Not even the $150 000 was paid on due date. It was only paid on 17 February 2001. The $300 000 seem never to have been paid by 2 April 2001. The payment history shows that after the $150 000 on 17 February 2001 the next payments were $20 000 on 28 February 2001, $20 000 on 30 March 2001 and $20 000 on 30 April 2001. So by 2 April 2001 plaintiff had only paid $190 000 out of $450 000.

Did the defendant cancel? No, it did not.

The defendant's major bone of contention as set out in its pleadings and in Rev Gawe's evidence was that the plaintiff's payments in the months of February 2002, March 2002 and April 2002 had dropped from $20 000 per month to only $12 600 per month. That this is what happened is correct. It was common cause at the trial. To paint the picture clearly the plaintiff's entire payment history is set out below:

DATE OF PAYMENT	**AMOUNT PAID [$]**
17 February 2001	150 000
28 February 2001	20 000
30 March 2001	20 000
30 April 2001	20 000
18 May 2001	40 000
7 June 2001	20 000
30 June 2001	20 000
10 July 2001	20 000
30 August 2001	34 900

27 September 2001	20 000
30 October 2001	20 100
30 November 2001	20 100
10 December 2001	22 000
30 December 2001	20 000
24 January 2002	20 100
28 February 2002	12 600
28 March 2002	12 600
30 April 2002	12 600
?? September 2002	240 000
14 October 2002	137 000
8 November 2002	68 000
Total	**950 000**

That the defendant's purported cancellation of the agreement of sale was motivated by the reduced instalments of $12 600 per month in the months of February 2002, March 2002 and April 2002 as aforesaid appears from its letter of 2 May 2002 on which it relied heavily. The letter read as follows:

> "**RE: CANCELLATION OF AGREEMENT OF SALE PART OF STD 644**
>
> Your attention is kindly drawn hereby to paragraph "A" Part II of the agreement of contract (*sic)* interred (*sic*) into between the Executive Council of the above organisation and yourselves, which has not been honoured on your part, and was further compounded by the drop of monthly instalment (*sic*) from ($20 000-00) twenty thousand dollar (*sic*) to only (12 600-00) twelve thousand six hundred dollars per month without any explanation at all.
>
> The writer our overseer made several visit (*sic)* to your place of work requesting for a written undertaking regarding your financial situation to present to our committee for consideration at it (*sic)* conference, but to no avail, and you did not appreciate his help.
>
> Under the circumstances the committee was left with no option but to cancel (the) agreement of sale; by copy of this letter we expect no further payment from you from this date onwards. Expect to get your refund cheque of the total payment made so far

which amounts to ($503 100) five hundred and three thousand one hundred dollars by end of August 2002 when our treasurer returns from holiday overseas."

Mr Munzara testified that the drop in instalments in the months in question had been fully explained to the defendant and had been agreed upon. He said several meetings had been held between the parties. The plaintiff's parlous financial situation at the time had been explained to the defendant. The plaintiff had sought an indulgence to pay reduced instalments for that period. It had then promised to accelerate its payments once it had got out of the woods. The indulgence had been granted, Mr Munzara said. It had all been verbal. However, Rev Gawe denied that any such meetings had taken place or that any such agreement had ever been reached.

Who then do I believe? I chose to believe Mr Munzara. His version seemed more consonant with the probabilities. Firstly, despite their written word in the form of the agreement of sale aforesaid, it seems that right from the onset, even before the ink was dry, the parties had acted in terms of separate verbal arrangements. The deposit had not been paid in accordance with what the written document had stipulated. But the defendant had not cancelled.

Secondly, plaintiff's history of payments leaves me in no doubt that the parties never intended to adhere to a strict payment timetable. A rate of $20 000 per month seemed to have been used as an estimate or a guide. That rate had never been maintained for more than three consecutive months at any given period. But defendant did not cancel.

Thirdly, after April 2002 plaintiff's payments increased phenomenally. The first was $240 000. The second was $137 000. The third and last was $68 000. Thus plaintiff seemed to have kept its word that once out of the woods it would increase its instalments to compensate for the lean months.

Fourthly, and most importantly, the defendant had accepted all the plaintiff's payments that were made after defendant's purported cancellation. Mr Munzara said Rev Gawe himself would collect all the cheque payments to deposit into his bank account and would subsequently issue receipts. Rev Gawe maintained that the plaintiff was paying directly into the bank account and that he would issue the receipts only when the effects had been cleared. Whatever the position was, the fact remains that the defendant did accept plaintiff's payments after its purported cancellation. Quizzed on that aspect Rev Gawe maintained that it was defendant's intention to refund plaintiff's payments once an alternative buyer to the property had been found. Further quizzed on the position that it was now over

ten years and yet the defendant had not made any refunds, and that at any rate, the currency in use was now United States dollars and not Zimbabwean dollars which the plaintiff had paid, Rev Gawe said the defendant was now waiting for the court to tell it what to do.

On those facts plaintiff had pleaded waiver of rights by the defendant. It was plaintiff's position that having accepted further payments from the plaintiff after its purported cancellation of the agreement the defendant must be presumed to have waived its rights to cancellation on the basis of the perceived breach. The defendant maintained that it never waived its rights to cancel and that in fact it had cancelled and that it could not understand why plaintiff had gone on to make those further payments after its cancellation.

The defendant's sincerity is questionable. What should be difficult to understand cannot be plaintiff's continued payments after the purported cancellation. The plaintiff had at no stage ever recognised the defendant's purported cancellation, or its right to do so. What should be difficult to understand should be the defendant's continued acceptance of those payments. What should be difficult to understand should be the defendant's conduct in not only accepting those payments but also going on to spending the money. What should be difficult to understand should be the defendant's conduct that more than ten years later it had not refunded the purchase price despite having at some stage unilaterally undertaken to do so. The defendant said it was now waiting for the court to tell it what to do, especially given the change in the functional currency. Those payments were not made surreptitiously. Rev Gawe had been an active recipient. Despite promising in May 2002 to refund the $503 100 that the plaintiff had by then paid, the defendant had gone on to receive three further cheques from, or on behalf of the plaintiff and to cash them. That conduct was plainly consistent with a waiver of rights. Therefore I hold that whatever perceptions of breach of agreement by the plaintiff the defendant had subsequently decided to waive its rights to rely on them to cancel that agreement.

Where a party alleges waiver of rights by the other party this must be specifically pleaded. In the majority decision by EBRAHIM JA and KORSAH JA in the case of *Chidziva & Ors* v *Zimbabwe Iron & Steel Co Ltd* 1997 (2) ZLR 368 (S) the Supreme Court said that although the defence of waiver should normally be pleaded, in exceptional circumstances the court can always consider it even in the absence of proper pleadings. At p 385A – B EBRAHIM JA put it thus:

> "The general rule is that affidavits must contain the facts upon which a party relies for relief and not principles of law applicable to those facts. Thus all that the respondent had to do was to set down facts from which it may be deduced that there had been a waiver by the appellants."

As I said earlier on, this matter started off by way of notice of motion. Both parties had been self-actors. In the founding affidavit Mr Munzara, dealing with the defendant's letter of cancellation of 3 May 2002, had averred as follows:

> "(8) On 3 May 2002 the first respondent wrote to applicant a letter attached hereto as 'Annexure C'.
>
> (9) In pursuant (*sic)* to 'Annexure C' Applicant met the first respondent on several occasions to try and find a fair settlement to the issue. Applicant successfully convinced the first respondent and it was resolved that the applicant continues with its payment as per agreement.
>
> (10) Payments have never ceased since February 2001 to date of final payment"

When subsequently the parties had engaged legal representation and had been directed to file proper pleadings, the relevant section of the plaintiff's declaration stated as follows:

> "6. The first defendant (*sic*) made all the payments towards the full outstanding balance until it was extinguished. The first defendant (*sic*) would explain to the plaintiff (*sic*) in writing in situations where it will (*sic*) have failed to make timeous payments.
>
> 7. The first defendant (*sic*) continued to accept all late payment, thus, tacitly the parties varied the repayment terms."

Although lacking precision I am satisfied that the plaintiff's pleadings sufficiently laid out facts upon which waiver could be relied upon.

The waiver of contractual rights has to be communicated to the other party. INNES CJ in *Mutual Life Insurance Co of New York* v *Ingle* 1910 TPD 540, in a passage quoted with approval by KORSAH JA in the *Chidziva's* case above, at p 383A – B put it thus:

> "Until the intention to waive a right is communicated to the other party, **or evidenced to him by some act**, a change of mind is always possible and permissible. ….**When**

the renunciation, though not communicated, is evidenced by conduct inconsistent with the enforcement of the right, or clearly showing an intention to surrender it, then also the intention may be acted upon, and the right perishes" [emphasis by KORSAH JA and also by myself]

Thus waiver of contractual rights can be express or by conduct. The party alleging waiver must prove a decision on the other party to abandon his rights. Where the other party exhibits conduct which plainly evinces an intention to abandon contractual rights it can be inferred that such rights have in fact been waived. In the present case, quite apart from plaintiff's evidence that the parties did agree on a reduction in the instalments for a limited period, the acceptance by the defendant of subsequent payments by the plaintiff, and the fact that the defendant went on to spend that money, can only but mean that the parties had agreed on the reduced payments or that the defendant had abandoned its rights to rely on such purported breach. In the premises I find for the plaintiff on this point as well.

There are a few other points that the defendant raised which I feel I must dispose of. The first is the non-prejudice clause in Part II of the agreement and which I quoted at the beginning of this judgment. The clause was cast in the usual format that any extension of time or indulgence or concession granted to the plaintiff, as purchaser, by the defendant, as seller, would not in any way prejudice the rights of the defendant. However, the defendant cannot rely on that clause. It is those very rights enshrined in that clause that the defendant waived, if not expressly as stated by the plaintiff, certainly by its conducted. Defendant is estopped from going back to the protection of that clause.

The second point is that for its cancellation the defendant relied not only on its letter of 3 May 2022 aforesaid but also on its other letter to the defendant on 25 May 2003, i.e. a year later. Before that letter the defendant had written the other letter of 26 December 2002 which I referred to earlier on and in which, among other things, the defendant had acknowledged those three payments by the plaintiff after the purported cancellation. In that December 2002 letter the defendant had advised that it was going to have its conference in April 2003 and that it would be at that conference that the plaintiff's issue would be fully discussed and the decision communicated immediately afterwards.

So defendant's third letter of 25 May 2003 aforesaid was now communicating defendant's final position, presumably after the April 2003 conference. That letter read in part as follows:

"**RE: CANCELLATION OF AGREEMENT OF SALE STAND 644 M/P**

The executive council of the said organisation hereby notify you that after a long consideration during its business meeting held during Easter interval, has decided to abide by the decision of its committee to cancel the agreement of sale as advised by its letter of the third 3rd of May 2002.

In terms of the agreement of sale part II which you entered into you subsequently breached those terms of agreement of sale, hence the writer has been instructed to advise you that the books of the organisation are being audited for our financial year ending 30th June 2003.

Under the circumstances the organisation shall be glad to make refunds thereafter."

Plainly such a letter could not take the defendant's case any further. The letter was not another cancellation. It was merely a purported confirmation of the previous purported cancellation of 3 May 2002. But since, as I have ruled, that cancellation was subsequently waived, and had therefore put to an end any perceived rights of the defendant, there was nothing else left for the defendant to confirm.

The third and last point was, even assuming that the defendant had had the right to cancel, whether it had cancelled in terms of the agreement. It did not. Even though lacking precision the breach clause was plain. The intention of the parties was easily discernible. That clause, put plainly, said that if the plaintiff failed to pay, or if it breached the agreement in some other respect, then the defendant would be obliged to give the plaintiff 31 days' written notice to pay or to remedy such breach. It was common cause at the trial that this had not been done.

The agreement also said that if despite the 31 days' notice the plaintiff had remained in default, then the defendant would be entitled to cancel or terminate the agreement. Only if the defendant would have done that would it become entitled to sue. The use of the word "*option*" in that clause *("... in which event the seller shall have **the option** to institute legal proceedings against the purchaser...")* was not, in my view, meant to suggest that instituting legal proceedings was one of many other options available to the defendant. In my view, given the context, the term *option* could only refer to the defendant's right to proceed with legal action only after the mandatory 31 days' written notice had been given to the plaintiff. In other words, it could only be that mandatory notice that would unlock the defendant's right, or "*option*", to institute legal proceedings. Without that notice first having been given

the defendant's right to sue would not mature. It was common cause that the defendant neither gave the notice nor, let alone, sued the plaintiff to enforce the cancellation.

In the final result I make the following orders:

1 judgment be and is hereby entered for the plaintiff,

2 within seven (7) days of the date of the handing down of this judgment, or such other extended period as the exigencies of the situation may require, the defendant shall transfer, or cause to be transferred, to the plaintiff all its rights, title and interest in the property known as certain piece of land situate in the district of Salisbury, being a subdivision of Stand 644 Marimba Park Township, measuring 6 820 m^2, by signing all the necessary transfer documents and doing all that may be required to be done to effect such transfer,

3 in the event that the defendant fails or neglects to comply with this order then the sheriff for Zimbabwe, or his lawful deputy, shall, at the defendant's cost, be authorised, directed and empowered to sign all the relevant documents and to take all such other steps as may be necessary to effect the transfer aforesaid,

4 the defendant shall pay the plaintiff's costs of suit.

Musimwa & Associates, plaintiff's legal practitioners
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