GIFT MABVUNZA
versus
MILDRED & MATHIAS (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 22 July & 14 September 2016

Opposed application for a declaratory order

K Gama, for the applicant
K Muronda, for 1st respondent
2nd Respondent in default

CHAREWA J: This is an application for an order declaring that

1. The agreement between the parties was for a divisible sale of five (5) separate and distinct stands which can be paid for and transferred separately, or Alternatively that the agreement is null and void for lack of consensus between the parties;
2. Clause 6 iii conferred on the seller the right to hold onto any part payment as security pending quantification of actual damages, or alternatively that the forfeiture clause is disproportionate to any loss suffered and therefore invalid;
3. The respondent be ordered to pay back $110 000 paid in pursuit of the agreement; and
4. Costs.

The respondent counter applied for an order as follows:

1. That respondent be ordered to pay the outstanding balance of $118 587.20;
2. Interest at 15%[1]; and
3. Costs of suit on the higher scale.

The facts

The facts of the matter are that the parties entered into a sale agreement for residential stands numbered 1085, 1086, 1113, 1087 and 1088 Ventersburg Township of Lot 1A of Inverneil situate in the District of Salisbury on 4 December 2012. The agreement provides

[1] Presumably in terms of paragraph 2(b) (ii) of the agreement of sale

the sizes and prices of each stand separately as 2716, 3285, 2414, 2261, and 2684 square metres and $40 740, $49 275, $32 210, $33 915 and $40 260 respectively.

Parties' submissions

Apart from the use of the singular words "property" and "piece of land" there is no specific reference that the stands were being sold as a single block, for instance by providing for the global area or the global price.

Therefore the applicant submits that it was his understanding that he was purchasing separate stands and could therefore decide to abandon one or more of them and proceed with the rest. He states that he took advantage of the availability of stands to select those contiguous to each other for his convenience. He further submits that he assumed that the respondent put all stands on a single agreement also for its convenience since the properties were being sold by one seller to one purchaser. Finally, it is his submission that he bought the property in his personal capacity, which is why the sale agreement is in his name.

Now that his business from which he earned his income is in trouble or defunct, he can no longer afford all five stands and wants to relinquish the two most expensive ones which are stands 1085 priced at $40 740 and stand 1086 priced at $49 275 and retain the three least expensive stands. And since his understanding was that this was a sale of separate properties grouped under one agreement for purposes of convenience, he should be entitled to the declaratory order that he seeks otherwise the agreement should be found to be void for lack of *ad idem.*

For its part, the respondent submits that the use of the singular words meant the stands were being sold as a single block. It goes on to state, the applicant intended to have a consolidation of the stands done at some future point, in order to create spacious space for his business, Perfect Bakery (Pvt) Ltd, hence the selection of contiguous stands.

Applicant denies that he bought the residential stands for his business, which, as a separate legal person, was capable of buying and owning its own premises. In any event, he submits, at the time of the agreement, the business was already established on its own commercial property, such that there was absolutely no reason for him to want a future consolidation of residential stands for the business.

The issue

It being common cause that the applicant bought 5 residential stands from respondent, the issue I must resolve is whether they were sold as an indivisible block or as separate divisible properties, merely covered by one agreement for the parties' convenience; and the consequences of deciding one way or the other. This therefore is more of a factual issue which I must decide on a balance of probabilities on the facts before me.

The agreement of sale

The test for severability of a contract is trite[2]. I notice that the agreement of sale, from which the entire problem emanates, is not entirely clear and is subject to different interpretations. As respondents state, it refers to "property" and "piece of land" which raises a presumption that the property was being sold as one lot.

But it also refers to "purchasers" when in fact there was only one purchaser, the applicant. This raises the question in my mind that this agreement was a template which was not properly edited, and reference to "property" and "piece of land" could just have been as much an error as reference to "purchasers". To my mind, the resort to these words does not take the case further on the path to resolution.

Paragraphs 1(a)(i) and 2(a) clearly refer to separate pieces of land with separate prices. The agreement makes no attempt to provide the total land area or the total purchase price due which I would have thought normal and essential were the parties in agreement that the land was being sold as a block. Nor is there any reference to any intended consolidation in the agreement of sale.

I do not think that reference to 20% deposit and payment of the balance in terms of para 2(b)(i) and(ii) automatically refers to the total purchase price for the 5 stands. It could just as well refer to 20% of the purchase price for each individual stand.

And contrary to the provision of para 3(a) in particular, which provides that "The property shall be transferred…" it was never going to be possible to transfer the 5 stands as a block: they would have had to be transferred individually, as the agreement does not provide that the properties would be consolidated prior to transfer.

Ergo, I cannot find that this was an indivisible agreement of sale for one block of land, but was rather, the sale of five separate pieces of land with separate prices, between the same seller and same purchaser, merely contained in one document for ease of reference.

---

[2] See *Munn Publishing Private Limited* v *Zimbabwe Broadcasting Corporation* 1994(1) ZLR 337 S

Having found the agreement between the parties to be a separate and divisible sale of 5 stands, I do not consider it necessary to decide on the alternative prayer: whether the agreement is null and void for lack of consensus with the consequence that the applicant is not entitled to a refund of the payment of $110 000 which he has made.

The consequences

The result of this finding is that the deposit and instalments paid must be prorated as between the stands. Should the applicant wish to resile from the agreement to purchase any one or more of the stands, he can do so subject to the terms and conditions of the agreement, in particular para 6 thereof.

However, since I found the agreement to be a divisible sale of five separate stands, the decision not to proceed with the purchase of any one or more stands shall not affect applicant's rights with respect to the stands he opts to retain. In other words the respondents shall not be entitled to cancel the contract with respect to the stands the applicant wishes to retain, merely because he has decided not to proceed with others.

In the present case, the respondents have not counterclaimed for cancellation of the agreement but have sought specific performance. In the premises, they are only entitled to seek an order for specific performance with respect to the stands which applicant wishes to drop, which are stands 1085 and 1086, as applicant intends to continue with the sale of stands 1113, 1087 and 1088 in any event.

On the counterclaim for specific performance, because applicant's reasons for seeking to resile from the agreement with respect to these stands is primarily his financial situation and secondarily the lack of service provision by the respondents, I would be inclined to grant the respondent's prayer. I say the service provision is a secondary reason, because the letters exchanged between the parties are specific: that he is facing financial problems and wishes to drop two stands. Therefore, even if the respondents serviced the stands, he would still be unable to continue paying for them or make any developments.

However, I do note that applicant makes the pertinent point that he has not been given 7 days or 30 days' notice to rectify his breach in terms of the agreement or in terms of the Contractual Penalties Act (Cap 8:04). Now, a perusal of the correspondence between the parties shows that in the penultimate paragraph of the letter written by respondent to applicant on 3 June 2014,Annexure F, (p 39 of the bundle), the respondent stated:

> "…….we are calling upon your Client that in accordance with his undertaking he makes payment of the full balance of the purchase price on or before the 30th of June 2014, failure of which our Client is left with no option but to enforce their rights for cancellation with claim for damages, and/or payment of the full balance of purchase price, with accrued interests."

It seems to me this is adequate notice to the applicant rectify his breach in terms of the contract. I am of the view therefore that, on the papers before me and the submissions made, applicant has not shown any cause why I should not order specific performance on the prorated balance of the purchase price with respect to stand 1085 and 1086.

Finally, I do not find that para 6(iii) is disproportionate. It is very clear in its terms: it is not a forfeiture clause in the strict sense of that term, as it only entitles respondents to retain monies paid pending proof of damages. In any event, for purposes of this case, respondents have not sought to retain the deposit and instalments on stand 1085 and 1086 pending proof of damages. They have sought an order to compel the applicant to pay the balance due on those stands. For what it's worth, I will order the declarator sought in this regard as it is within the meaning of the clause.

Costs

The applicant had claimed for costs of suit, while the respondent had claimed costs on the higher scale. The respondent has not satisfactorily justified the higher costs claimed. In any event, I assess the success rate of each party on its main claims at fifty percent (50%). I am therefore inclined to exercise my discretion not to grant cost to either side.

DISPOSITION

In the result, it is ordered that

1. The sale agreement between the parties dated 4 December 2012 be and is hereby declared to be a divisible sale of five separate residential stands which can be paid for and transferred separately and independent of the other,
2. Clause 6(iii) of the agreement be and is hereby declared to confer to the respondent the right to hold any part payment only as security for the payment of damages pending the quantification of the actual damages through due process of law,
3. The applicant shall pay to the respondent the prorated balance of the purchase price due on Stands 1085 and 1086 with interest thereon at the rate of 15% per annum from the date of judgment,

4. Each party shall bear its own costs.

Gama and Partners, applicant's legal practitioners
Muronda and Muyangwa, 1st respondent's legal practitioners