AARON MAJERO
versus
DUBEKILE DANDA

HIGH COURT OF ZIMBABWE
HLATSHWAYO & MAVANGIRA JJ
HARARE, 13 September 2011 and 14 March 2018

Civil appeal

D P Drury, for the appellant
Ms *A Mapanzure,* for the respondent

HLATSHWAYO J: This is an appeal against the decision of the magistrate sitting in the Marondera magistrate court. The burden of the appeal is that the court *a quo* erred in finding against the appellant in the application for the cancellation of an agreement of sale and order for the eviction of the respondent from Shop Number 22035 Landas Business Centre, Chihota hereinafter referred to as "the property".

The one ground of appeal is couched as follows:-

> "The Learned Magistrate erred in failing to consider the fact that the respondent failed to pay the purchase price in full on time and as such the appellant had a right to cancel the contract since time was of the essence."

Basically the common cause facts are that the appellant and owner of the property entered into a contract of sale of the property with the respondent. The purchase price was Z$50 million. In terms of clause 2 of the agreement of sale the respondent was required to pay a deposit of $10 million on the date of signing of the agreement, which she did, and monthly instalments of $6 million up to the end of August 2004.

For the first two months (March and April 2004) the respondent did not pay any instalments as she claimed that she had not been given vacant possession of the property by the appellant and that she had to resist in and out of court disturbances from other persons who claimed to have purchased or rented the same property. However, thereafter she commenced payment of instalments but in a very irregular manner and in disparately varying amounts as shown below by the summary of the payments constructed from the record.

Payment Record

Exhibit B	6/2/04	10 000 000
Exhibit C	28/05/04	6 000 000
Exhibit D	31/05/04	450 000
Exhibit E	30/06/04	3 000 000
Exhibit F	1/07/04	1 000 000
Exhibit G	6/7/04	500 000
Exhibit H	20/7/04	500 000
Exhibit I	7/8/04	500 000
Exhibit J	26/7/04	4 000 000
Exhibit K	3/8/04	500 000
Exhibit L	3/8/04	500 000
Exhibit M	19/8/04	1 400 000
Exhibit N	6/9/04	150 000
Exhibit O	23/9/04	2 000 000
Exhibit P	17/11/04	2 000 000
Exhibit Q	3/12/04	2 000 000
Exhibit R	6/1/05	500 000
Exhibit S	8/1/05	3 500 000
Exhibit T	25/1/05	5 000 000
Exhibit U	undated	1 000 000
Exhibit V	28/2/05	9 130 000 (submitted in full and final settlement)

Be that as it may the appellant continued to receive the above irregular payments in varying sums without demur. By the end of August 2004 when the balance of $40 million should have been paid in full, only about half that amount had been deposited into the appellant's account. The appellant did nothing about the issue but, instead, continued to accept further payments up to five months thereafter until the full purchase price was exceeded. When the respondent sent a cheque for the amount of $9 130 000 in "full and final settlement of the purchase price", the appellant sued for cancellation of the contract and eviction of the respondent from the property. There was no evidence adduced in court that the final cheque was returned to the respondent, the probability being that it was also converted to appellant's own use as were all payments made before and after due date. In fact, even when the final

cheque is excluded, the payments made and accepted had already exceeded the agreed purchase price but the appellant had continued visiting and pestering the respondent for more payments. The appellant never tendered any payment made to him after due date but simply insisted on cancellation without reimbursement.

The court below held that the appellant had lost his right to cancel the agreement either through estoppel, tacit variation, election or waiver, thus;

> "Loss of right to cancel. Wille's *Principles of South African Law*, van Heerden, Visser, van der Merwe p 522 states that "… a claim for cancellation may be defeated by the invocation of *estoppel*. A creditor who continuously accepts defective performance from the debtor loses his right of cancellation for past breaches, he can regain this right only by giving the other party notice that he will in future insist strictly on performance as stipulated in the contract." *Garlize* v *Phillips* 1949(1) SA 121 (A). The true basis of this equitable principle is said to be *estoppel*.
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> The fact that the plaintiff went ahead to accept all payments after August 2004 as payment in terms of the contract between him and the defendant, I am persuaded that it was a tacit *variation* of the contract. In the circumstances his claim for cancellation of the contract of sale is not sustainable. Failure by the plaintiff to cancel within a reasonable time appears to me to justify an inference that the contract has been *affirmed*, or that the right to cancel had been *waived*." (*emphasis added*)

In two brief paragraphs above, the court *a quo* finds that four principles of law were applicable, namely; estoppel, variation, election and waiver. Putting aside the issue of variation, tacit or otherwise, which does not appear applicable in this matter as an open-ended variation is unthinkable, it is my view though that the approach of the court, in evoking the other legal concepts, viz., estoppel, waiver and election, and sometimes treating them interchangeably did not amount to a misdirection as these principles of law often overlap. For example, in Visser, Pretorious, Sharrock & Van Jaarsveld's *Gibson South African Mercantile & Company Law*, Juta & Company Ltd, 2003 p. 181, waiver and estoppel are discussed thus:

> "Similar considerations apply where the landlord has consistently accepted late payments in the past; where, in other words, he has waived the exercise of his rights under the forefeiture clause on previous occasions. Is he entitled to exercise his rights under the forefeiture clause on future late payment by the tenant? Here also it depends on the facts of the case…There is some doubt whether the principles of waiver or those of estoppel operate here. The authorities rather favour the latter (*Myerson* v *Osmond Ltd* 1950 (1) SA 714 (A); *Sotiriadis* v *Patel* 1960 (2) SA 812 (SR)). It seems reasonable to suggest that both sets of principles may apply. The question would then be – is the landlord's conduct such that a waiver would be implied, or such that he is estopped? There will clearly be much overlapping. But this is quite common in the law with implication and estoppel."

And in Van Der Merwe, van Huyssteen, Reinecke and Lubbe, *Contract: General Principles* Juta & Company Ltd, 2012, p 356 the principles of 'waiver' and 'election' are discussed and the conclusion reached that in practical terms they amount to the same thing:

> "Such an election has been said to be a waiver in the sense of a unilateral juristic act by which the contractant who has a right to resile abandons this right…The concept of election in the sense of a unilateral juristic act by which a contractant exercises a choice between inconsistent alternatives, seems to be a better reflection of what really takes place when a contractant decides either to cancel or to uphold the contract…Indeed, election and waiver have even been equated as species of the same general legal concept. Although adherence to one or other of these two concepts would probably not make much difference in terms of practical results, describing the particular juristic act as an election is probably more meaningful."

Accordingly, it appears to me that in the specific circumstances of this case, the appellant lost his right to cancel, or resile from, the agreement by consistently accepting late, insufficient and varying amounts as payments under the contract. Whether one characterises such conduct as estopping him from repudiating the contract or as constituting waiver or election makes practically little difference. For example, the authors, Visser, *et al*, Gibson's *South African Mercantile & Company Law*, *supra,* make the following observation:

> "Estoppel succeeded in *Resisto Dairy* v *Auto Protection Insurance*, where the insurer 'considered' a claim, tendered out of time, for seven months. **It was held to have acted in a manner inconsistent with its later repudiation of liability (election?). Its silence and inaction constituted a representation that it accepted liability, (waiver?) which it was estopped from denying.**" P.523 (emphasis and comments added)

At the hearing of this appeal, the appellant's legal practitioner, Mr *Drury*, raised for the first time what he termed a question of law that waiver must be pleaded specifically and if not so pleaded cannot be relied upon as a defence. In Amler's *Precidents of Pleadings*, Butterworth Publishers, 4th ed, 1993 it is stated that it is only under exceptional circumstances that the court would consider the defence in the absence of proper pleadings. In my view, the failure to earlier raise the objection to the defence and the fact that the other defences are intrinsically connected to waiver may constitute the necessary exceptional circumstances, but the issue really is of little moment because even if one were to exclude waiver (as far as it is possible to do so conceptually while considering kindred defences), the remaining defences of estoppel and election are still sufficient to non-suit the appellant.

As far as estoppel is concerned Ms *Mapunzure* for the respondent submitted, and correctly so in my view, that appellant's continuous acceptance of late and insufficient payments both before and after due date over a period close to a year amounted to an irrevocable condonation of such conduct, which could only be impugned upon proper notification that in future the appellant would insist strictly on performance as stipulated in the contract. Such notice did not eventuate and the respondent was never put *in mora*. The duty

to put a respondent on notice in such circumstances was explained in *Garlick* v *Phillips (supra)* thus:

> "So long as its attitude remained one of indifference towards late payments of rent, there was of course no necessity to speak, but when appellant's state of mind changed from one of indifference to one of a desire or intention to take advantage of late payments of rent in order to obtain ejectment, then I think a duty arose to make that changed attitude known to the respondent. A reasonable man in appellant's position would have known that a long continued receipt by him of late payments of rent without protest such as occurred in this case, would lead respondent into the belief that he had no objection to late payments and did not treat them as breaches of contract and would not, without notice, do so in future." Pp.132-133

The respondent was also on sound ground when she submitted on the basis of election, that enforcement and cancellation being inconsistent with each other or mutually exclusive, the innocent party must make his election between them. He cannot approbate and reprobate. He cannot blow both hot and cold by accepting and converting to his own use the full purchase price paid to him and at the same time claiming cancellation. The concept of election was stated by WATERMEYER AJ in *Segal* v *Mazzur* 1920 CPD 634 at 644-5 as follows:

> "Now, when an event occurs which entitles one party to a contract to carry out his part of the contract, that party has a choice of two courses. He can elect either to take advantage of the event or he can elect not to do so. He is entitled to a reasonable time in which to make up his mind, but when once he has made his election he is bound by that election and cannot afterwards change his mind."

Therefore, the appeal cannot succeed since on the specific facts of this case the appellant lost his right to cancel because on the grounds of estoppel he consistently accepted faulty performance and could not change this attitude without prior notification of the respondent or that through silence and inaction he can be taken to have elected to uphold the contract in the face of its violation. The costs should follow the outcome.

Accordingly, the appeal is dismissed with costs.

MAVANGIRA J agrees ……..

Gallop & Blank, appellant's legal practitioners
Kantor & Immerman, respondent's legal practitioners