Judgment No. HB 47/07
Case No. HC 1663/05

DONALD DONATI VUNDHLA

Versus

ALICK WILLIAM THABANI DUBE

And

THE REGISTRAR OF DEED OF BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 17 FEBRAURY 2006 AND 12 APRIL 2007

P Ncube, for the applicant
M Nzarayapenga, for 1st respondent

Opposed Application

NDOU J: On or about 7 March 2000 the applicant bought from the first respondent a vacant and undeveloped piece of land Lot 5 of Lot 6B for the sum of $80 000,00 payable in cash against transfer. The purchase price for that piece of land was paid to first respondent in full by the applicant. To facilitate the sale, first respondent, as the owner of Lots 5 and 6 of Lot 6B of Riverside Estates, had to subdivide the piece of land to come up with one that he sold the applicant. The remainder of Lot 6B had a house and other improvements and first respondent resided in that portion. In September 2000, first respondent agreed to sell the said remaining piece of land which he still held and which included the house for a sum of $800 000,00. The parties signed a written agreement of sale for the latter sale. The latter agreement is the subject matter of these proceedings. Whilst the original price had been agreed at $800 000,00 on or about 2 July 2001, by mutual agreement, there was a novation of the agreement in respect of the purchase price and the time within which such purchase price was to be paid. This price adjustment was done at the instance of first respondent who felt that the failure to pay the original purchase price by the end of

2000 had prejudiced him in view of inflation. Hence the price had to be re-adjusted to take that into account. This novation was reduced into writing in the first respondent's own hand-writing as its author. The revised purchase price was now a sum of $1 716 000,00 and that there was a sum of $442 000,00 that was payable then with the balance payable in December 2001. Thus this agreement effectively was converted into an instalment sale agreement. The first respondent received all but $800 000,00 of the purchase price as the applicant tried to accelerate the payments that were due in respect of the novated agreement. In or about September 2001, the first respondent sought a further revision of the purchase price and threatened or alluded to him selling the property to other prospective buyers who were prepared to pay him a higher amount.

Nonetheless, in compliance with the novated agreement, the applicant whilst mindful of the fact that the balance of the purchase price was only payable by December 2001, tendered the balance of $800 000,00 to the first respondent on 18 September 2001 (such tender is filed of record). Such tender was made more than three months before the final instalment was due to be paid. The first respondent rejected the tender.

The applicant on 3 October 2001 pointed out to the first respondent in writing, that the legal position is that he had complied with the novated agreement and that if the first respondent sought to cancel the agreement, he would have to give 30 day written notice to the applicant for such cancellation to be lawful and effective. This the first respondent did not do. The matter was subsequently debated at length and over a period of time during which first respondent tried through discussions with the

applicant (through his agents) and also by seeking the assistance of Reverend D Ndlovu to speak to the applicant. All these efforts by the first respondent were with a view of trying to persuade applicant to agree to have the agreement cancelled and for him to

be allowed to refund applicant the monies that had been paid to him. The first respondent's argument was that in view of inflation, the sale of his home was no longer worthwhile, and that the proceeds of the sale were no longer sufficient to achieve what he initially intended to achieve when he decided to sell. Further, he indicated that when he sold the house he had not consulted his wife and he was now in trouble at his home because of this. The first respondent has flatly refused to take the necessary steps to transfer the property to the applicant. He is not even prepared to accept the balance tendered to him necessitating these proceedings. The first respondent has in fact, written numerous letters pleading for mercy from the applicant. In one such letter dated 3 March 2003, the first respondent acknowledges that he has no defence to the applicant's claim but can only plead for the applicant's mercy and understanding.

The parties are in agreement that there are only two issues for determination, namely, firstly whether the claim has been prescribed, and, secondly whether the agreement of sale was lawfully cancelled by the first respondent. I will deal with these two issues in turn.

Prescription

There is no dispute between the parties as to when the prescription begins to run. The issue is whether the running of prescription was interrupted by an express or tacit acknowledgment of liability pursuant to the provisions of section 18(1) of the Prescription Act [Chapter 8:11]. It is trite that an objective assessment is used in determining what constitutes an acknowledgment for the purposes of section 18(1), *supra.* The construction of section 18(1) was the subject matter in *FMB Zimbabwe Ltd* v *Fortress Industrial Investment P/L & Anor* 2000 (1) ZLR 221 (S). At p 224H to 225D, GUBBAY CJ had this to say:

"Section 18 (1) of the Act … does not provide examples of conduct constituting an acknowledgment of liability … Acknowledgment may therefore take the form of post payment of the debt or payment of interest thereon (see *Cape Town Municipality* v *Allie* 1981 (2) SA 1 (C); or, the giving of security for payment of the debt (see *Markham* v *South African Finance & Industrial Co Ltd* 1962(3) SA 669 (A) at 676E). An acknowledgement of partial liability for the debt interrupts prescription in respect of the entire indebtedness.

The use by legislature of the word "tacit" in section 18 (1) is important. It suggests that the debtor's words and conduct should be taken into account. (See *Cape Town Municipality* v *Allie, supra* at 7D). However, conduct alleged to constitute a tacit acknowledgement of liability must be seen in proper context. See *Benson & Anor* v *Walters & Ors* 1984(1) SA 73 (A) at 87C-88A.

Finally, in the review of the general principles applicable to the interruption of prescription, it should not be overlooked that in the determination of whether an existing liability was acknowledged an objective assessment must be made of what the debtor's conduct conveyed in respect to whether or not it was subjectively intended to acknowledge liability. *Agnew* v *Union and South West African Insurance Co Ltd* 1977(1) SA 617 (A) at 623B-C.
That inquiry will always be a factual one – See *Petzer* v *Radford (Pty) Ltd* 1953(4) SA 314(N) at 318E"

In *Cape Town Municipality* v *Allie, supra,* MARAIS AJ, in exposing a similar South African statutory provision in the South African legislation and after emphasising the importance of the use of the word "tacit" had this to say at page 7G-H.

"Thirdly, the test is objective. What did the debtor's conduct convey outwardly? I think this must be so because the concept of a tacit acknowledgement of liability is irreconcilable with the debtor being permitted to negate or nullify the impression which his outward conduct conveyed, by

claiming *ex post facto* to have had the subjective intent which is at odds with his outward conduct."

The applicant has submitted that *in casu,* not only is there a tacit acknowledgment of liability by the first respondent, there is in fact express acknowledgment of liability. In support of this contention reference is made to the following. First, on 4 June 2001, the first respondent wrote a letter to the applicant explaining why the original purchase price had to be changed in view of inflation. The first respondent worked out his figures and his justification for those figures. In another memorandum dated 2 July 2001, the first respondent prepared a statement of account recording the variation of the purchase price that had been agreed upon. The latter memorandum was prepared and signed by the first respondent and accepted by the applicant. It is significant that the first respondent uses the expression "we chose to use minimum figure 20%" thus confirming that the memorandum was prepared by agreement between the applicant and the first respondent. By preparing the above mentioned two

documents, the first respondent clearly acknowledged that he was obliged to transfer the property to the applicant in terms of the agreement entered into by the parties. In a further document written by the first respondent to the applicant on 25 February 2002 the former specifically makes the following telling words:

"… I, personally of the Mavankeni clan am not resisting moving out of the house, not in the least. The difficulty I face is that I have nowhere to go due to the difficult circumstances in this country of ours. … The truth as God knows is that I cannot afford to buy a house because what money I do have is inadequate. Were it that I had come to you on bended knees to say I am begging you, I beseech you by the grace of God that you sympathise with me and my family. You indeed paid your money for which you were liable … I implore you through the grace of Jehova to sympathise with me …"

It is evident from the above that the first respondent acknowledged his obligation to transfer the house to the applicant was in existence and that he was liable to transfer that house but he was asking for the applicant's sympathy. He pleaded for mercy and asked that the applicant hear his "humble cry".

To me, this is with respect, an appeal for charity than justice. You do not plead for mercy unless you acknowledge liability or that you are in debt. You do not plead for mercy in this manner unless you acknowledge that you have no defence on the merits. If you have a case on the merits that is what you should say. It is, in my view, evident from the aforegoing that the first respondent had always acknowledged his liability to transfer the property to the applicant as late as 3 March 2003. Such acknowledgments interrupted the running of the prescription as provided for by section 18(1), supra. Accordingly, the point *in limine*, raised by the first respondent is without substance and is dismissed.

Cancellation

Any analysis of the facts of this case reveals that this is an instalment sale agreement of land as defined in section 2 of Contractual Penalties Act [Chapter 8:04]. An instalment sale agreement of land is defined as follows:

"… a contract for the sale of land whereby payment is required to be made:

a) in three or more instalments; or
b) by way of a deposit and two or more instalments and ownership of the land is not transferred until payment is completed."

The revised purchase price as at 2 July 2001 was a sum of $1 716 000,00. The first instalment was the sum of $274 000,00 which had already been paid leaving a sum of $1 442 000,00. The second instalment was $442 000,00 and the balance which is the third instalment was to be paid by December 2001. The purchase price was thus payable in three or more instalments and this is thus an instalment sale agreement. The Contractual Penalties Act, *supra,* applies to this agreement because of section 3(1) which provides as follows:

"(i) This Act shall apply in respect of
a) all penalty stipulations; and
b) all instalment sales of land, entered into on or after the 9th November 1973."

That being the case, the provisions of section 8 are relevant to this matter. Section 8(1) provides:

"No seller under an instalment sale of land may, on account of any breach of contract by the purchaser:
a) enforce a penalty stipulation;
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."

Subsection 2 of section 8 reads as follows:

"8(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 in the instalment sale of land concerned;
(ii) thirty days
whichever period is longer."

Subsection 3 of section 8 sets out the conditions on the delivery of the notice for it to

be valid, namely,

a) the notice must be delivered to the purchaser in person, or

b) it must be delivered by registered post at a place nominated for delivery of such notice.

The first respondent's purported notices fail dismally to meet these requirements laid down by the Contractual Penalties Act, *supra*. First and foremost, they are not notices at all. Secondly, they do not call upon the purchaser to rectify a specific breach. Thirdly, they do not give 30 days notice. Fourthly, there is no proof of their delivery in terms of subsection 3 of section 8.

In any event, even if the Contractual Penalties Act, were not to apply, it is evident that the first respondent never placed the applicant *in mora* and thus was not entitled to cancel the agreement. It is trite that the right to resile from an agreement does not merely arise by virtue of the fact that a contracting party has failed to carry out an obligation under an agreement timeously and has received a valid notice of rescission. In addition an essential requirement is that, the *mora* must relate to a vital or important term of the agreement. In other words, a notice of rescission is of no legal consequence unless it related to the failure to perform a vital or important term of the contract timeously – *Sweet* v *Ragerguhara* 1978(3) SA 131(D); *Oatorian Properties (Pty) Ltd* v *Maroun* 1973(3) SA 779(A); *The Mud-Man Empire (Pvt) Ltd t/a Blue Chips Agencies* v *Nechironga & Ors* HH-128-03 and *Zigwati* v M*unowapei* HB 80-06.

Further, the party's right depends upon the seriousness of the breach – *Aucamp* v *Morton* 1949(3) SA 611 (AD) at 619 and *Bhoprops Ltd* v *Levy & Anor* G-B 9-75. And it is trite that in order to constitute a notice of rescission, the language must clearly and unequivocally convey an intention to cancel the contract – *Asharia* v *Patel & Ors* 1991(2) ZLR 276(SC). The purported notices relied upon by the first respondent do not meet the requirements as set out above thus the applicant was never placed *in mora*. In *Kapenya and Another* v *Mpofu* SC-27-00, McNALLY JA had this to say in a similar situation at page 11 of the cyclostyled judgment:

"… they were never put to test; they were never placed *in mora*; their bluff, if it was a bluff was never called …" And at page 12 the learned Judge of Appeal continued as follows:

"But with respect, they failed to advert to the fact that the purchasers however, often they may have failed to perform their obligations were never placed *in mora.* They were never told to "pay within 14 days or else". That was the
fatal error committed by the series of lawyers who represented Ms Mpofu. They did not read, or they did not understand the agreement …"

In any event, the applicant's obligation according to the novated agreement was to pay the full amount of the purchase price by December 2001. The applicant paid before that due date as alluded above.

Accordingly, the first respondent could not lawfully cancel the agreement before December 2001 nor give notice before that date. The purported notices are therefore premature, ineffectual and null and void. The applicant's tendered purchase price should not have been rejected. Accordingly, the agreement was never lawfully cancelled.

Accordingly, the provisional order granted by this court on 6 October 2005 be and is hereby confirmed in terms of the draft.

Coghlan & Welsh, applicant's legal practitioners
Dube & Partners, 1st respondent's legal practitioners