McANINCH *v* MAISIRI & ANOR
Supreme Court, Harare Judgment No.
5-13 1-0/
McNally JA, Muchechetere JA & Malaba JA
Civil appeal

l8October200l & 11 July2002

Contract – condition – resolutive condition – what is – clause providing that ~fpayment not made by a certain date, the contract would be cancelled – effect – contract not automatically cancelled

The appellant sold a property to the respondents. A clause in the contract provided that if the respondents did not pay the full purchase price by a certain date, stated in the contract, the contract would be cancelled. There was a general provision that in the event of a material breach and failure to remedy the same within fourteen days' written notice, the innocent party had the right either to cancel the agreement and claim damages or, alternatively, to enforce it.

The price was not paid by the stated date. Subsequent to that date, however, the parties continued negotiating about the method ofpayment ofthe purchase price. At no time during the negotiations was there any intimation that the contract had been cancelled on the stated date. The appellant subsequently purported to cancel the contract.

Held, that if the clause relating to cancellation was a resolutive condition, it would show that the inetnion of the parties was to have the termination of the contract arise immediately and automatically from the failure by the respondents to pay the full price by the stated date. The clause would have contained words to the effect that on the happening of the event, the contract would be "considered" or "deemed" to have been cancelled. No act of cancellation would be required.

Held, further, that the words actually used showed that the intention of the parties was that the dissolution of the contract would be brought about by a deliberate act of cancellation by the innocent party. The appellant having failed to exercise that right, he could now cancel the contract only after giving fourteen days' notice.

Cases cited:
Agricultural Finance Corporation v *Pocock* 1 986 (2) ZLR 229 (5)
Bessler, Waechter, Glover & Co v *South Derwent Coal Co* [1 93 8] 1 KB 408; [1 93 7] 4 All ER
552 (KBD)
National Chemsearch (SA) (Ply) Ltdv Borrowman & Anor 1979 (3) SA 1092 (T)
Palmer v *Poulter* 1983 (4) SA 1 1 (T)
Ogle v *Vane (Earl)* (1868) LR 3 QB 272
R - Katz 1959 (3) SA 408 (C)

A P de Bourbon SC, for the appellant
J C Andersen SC, for the respondents

MALABA JA: On 15 May 2000 the respondents, who are husband and wife, made an application to the High Court for an order declaring the agreement of sale they entered into with the appellant on 25 November 1999 a valid and

enforceable contract. The order was to direct the appellant to take all necessary steps within seven days of the date of its making to have Lot 2 of Subdivision A of Lot 33A Hillside in the district of Bulawayo transferred into their names, failing which the Deputy Sheriff of Bulawayo was authorised and directed to sign all the necessary documents on the appellant's behalf for the purpose of transferring the property to them. The appellant was to pay the costs of the application. The High Court granted the respondents the order. This is an appeal against that judgment.

The application could have succeeded only if the facts stated by the respondents in the founding affidavit, together with such facts advanced by the appellant which were admitted by the respondents, justified the granting of the order. (*Nation Chemsearch (SA) v Borrowman and Ano* 1979 (3) SA 1092 (T) at 1095 B-C). It is necessary therefore to refer to the salient facts before considering the legal arguments advanced on appeal.

The dispute between the parties arose out of a written agreement signed by them on 25 November 1999, in terms of which the appellant sold to the respondents the immovable property commonly known as No. 7 Nairn Road, Hillside, Bulawayo ("the property"), for a purchase price of $2 300 000. The agreement provided that:

> "The purchase price of $2 300 000 plus assessed costs of $160 000, to be paid to the legal practitioners Calderwood, Bryce Hendrie & Partners by 6 December 1999, subject to special conditions herein." (the underlining is mine)

The special condition was that the respondents obtained a loan of not less than $1 300 000 plus assessed costs of $160 000 from a reputable financial institution, to be secured by a first mortgage bond to be registered against the property sold.

The agreement further provided that:

> "Notwithstanding anything to the contrary contained in this agreement, should the full purchase price less the agent's commission and capital gains withholding tax not be released to the seller by the 6th December 1999 the agreement will be cancelled on the 7th December 1999." (the underlining is mine)

Under the general conditions of the agreement there was a clause to the effect that in the event of a material breach and failure to remedy the same within fourteen days of written notice to do so, the innocent party had the right either to cancel the agreement and claim damages or alternatively enforce it.

Clause 10 provided that:

> "… no variations to this agreement or collateral agreements hereto shall be of any force and effect unless reduced to writing and signed by the parties hereto."

On 27 November 1999 the appellant and his wife were involved in a motor vehicle accident in which they lost a daughter and received serious injuries. The respondents had applied to Central African Building Society ("CABS") before 7 December 1999 for the loan of $1 300 000. CABS was willing to give them the loan provided the seller of the property agreed to invest part of the money with them in paid up permanent shares. On 6 December 1999 the respondents paid $1 million to the appellant's legal practitioners. They failed to pay the full purchase price and

assessed costs within the time stipulated. They paid the assessed costs in the sum of $160 000 on 17 December 1999.

The appellant had, on 8 December 1999, signed a General Power of Attorney in favour of his sister authorising her to act on his behalf in the matter of the sale of the property to the respondents. On 10 December 1999 the appellant's sister agreed with CABS to invest the sum of $1 300 000 advanced to the respondents as a loan in paid up permanent shares over two years. She said she reached the agreement to "facilitate the finalisation of the sale" of the property to the respondents. On 25 February 2000 CABS made the offer of a loan of $1 300 000 to the respondents. They accepted the offer three days later.

On 18 February 2000 the appellant asked the estate agents to reallocate $2.2 million of the purchase price to the immovable property and $1 million to movables for capital gains tax relief. The request could not be granted because the purchase price had already been allocated to the value of the immovable property. The appellant asked that the sum of $1 million held by his legal practitioners be released to him before transfer. The request was turned down.

On 17 January and 14 February 2000 the appellant's legal practitioners wrote to the estate agents asking for the agreement of sale for them to proceed with the registration of the transfer of the property to the respondents. On 3 March 2000 the estate agents instructed the legal practitioners to proceed with the registration of the transfer of the property. On 14 February 2000 the appellant's legal practitioners caused the respondents to sign a declaration by the purchaser. They also forwarded

to the respondents a *pro forma* account of transfer fees in the sum of $157 076. On 3 March 2000 the legal practitioners representing CABS drew up documents for the registration of the mortgage bond. The registration of the bond was intended to take place at the time of the registration of transfer of the property to the respondents on 10 March 2000.

At no time during these events and acts by the appellant or on his behalf was there an intimation that the contract had been cancelled on 7 December 1999. Alternatively, there was no suggestion that the appellant's right to cancel the agreement because the respondents had failed to pay the full purchase price on 6 December 1999 had been reserved.

On 10 March 2000 the appellant indicated to the respondents that he no longer wanted to proceed with transfer of the property into their names. He said he was cancelling the agreement of sale. The respondents refused to accept the appellant's unilateral repudiation of the contract and demanded transfer of the property into their names. The appellant, on the advice of his legal practitioners, took the view that the agreement had been cancelled on 7 December 1999. He said there could be no valid agreement of sale of the property between the parties after 7 December 1999 without it having been in writing and signed by them.

The learned judge held that the agreement of sale entered into by the parties on 25 November 1999 was not cancelled on 7 December 1999. Unfortunately, the learned judge did not address the legal effect of the conduct of the

parties after 7 December 1999 in the light of the "no variation except in writing" clause.

On appeal Mr *de Bourbon* argued that the learned judge erred in his approach to the matter. He said the learned judge failed to properly analyse the rights and obligations of the parties under the agreement of sale. It was his submission that the provision of the agreement requiring the respondents to obtain the loan and assessed costs from a reputable financial institution and pay the full purchase price by 6 December 1999, failing which the contract would be cancelled on 7 December 1999, was a resolutive condition. According to Mr *de Bourbon*, the agreement of sale was brought to an end on 7 December 1999 by the failure of the respondents to pay the purchase price within the time stipulated. The contention was that the parties attempted to negotiate a new agreement without success. He said in the absence of a written contract signed by the parties, there was no valid agreement on the basis of which the respondents could demand transfer of the property into their names. In other words, the conduct of the parties after 7 December 1999 had no legal effect.

Mr *Andersen's* submissions were to this effect. The conduct of the parties demonstrated a common belief in the validity of the original agreement after 7 December 1999. The contention that the "no variation except in writing" clause precluded the continued validity of the agreement after 7 December 1999, in the absence of a new contract recorded in writing to the effect that it remained in existence, overlooked the fact that it was necessary for there to be both a "non-variation clause" and a "non-waiver" clause. The "non-variation" clause in the agreement entered into by the parties on 25 November 1999 did not contain a "non-

waiver" clause. *Agricultural Finance Corporation v Pocock* 1986 (2) ZLR 229 (S) at 234E.

I consider first Mr *de Bourbon's* point that the clause requiring the respondents to pay the full purchase price by 6 December 1999, failing which the contract would be cancelled on 7 December 1999, was a resolutive condition.

The question whether or not a provision in a contract contains a resolutive condition is a question of the interpretation of the terms in which it is expressed. A proper construction of a provision, the terms of which express a resolutive condition, would show that the intention of the parties was to have the termination of the contract arise immediately and automatically from the failure by the respondents to pay the full purchase price and assessed costs on 6 December 1999. The happening of the event would be the cause of the immediate dissolution of the agreement of sale. No act of cancellation would be required to be done on 7 December 1999. *R v Katz* 1959 (3) SA 408 (C) at 129.

If the intention of the parties was to have the contract cease to exist on the failure by the respondents to specifically perform their obligation on 6 December 1999 they would have used words to the effect that on the happening of that event the agreement would be "considered" or "deemed" cancelled. The words the parties used were "the agreement will be cancelled on the 7th December 1999". Their intention was to have the dissolution of the contract brought about by a deliberate act of cancellation by the innocent party.

The failure by the respondents to specifically perform their obligations on 6 December 1999 as stipulated in the contract entitled the appellant to cancel the agreement without notice on 7 December 1999.

Having failed to cancel the contract without notice on 7 December 1999, the appellant could now do so only after giving the respondents' written notice to remedy the breach within fourteen days. The facts show that the appellant did not enforce the right which had accrued to him to cancel the agreement of sale on 7 December 1999. The reasonable inference is that he elected to abide the original contract. He was precluded from purporting to cancel the agreement after 7 December 1999 without placing the respondents in *mora*. If at all they were in breach of the contract on 10 March 2000 they were entitled to written notice to remedy the breach within fourteen days.

The learned judge correctly held on the facts that the original contract was kept alive and binding on the parties after 7 December 1999.

I turn to consider the next point on the legal effect of the conduct of the parties after 7 December 1999. Mr *de Bourbon* argued that it was incumbent upon the respondents to show there had been a written variation of the original contract absolving them from the obligation to pay the full purchase price and assessed costs by 6 December 1999 and that in some way by agreement recorded in writing that date was extended. He said the respondents had failed to establish that particular aspect.

I agree with Mr *de Bourbon* that the facts do not prove an oral agreement between the parties to vary any of the terms of the contract of sale before or after breach by the respondents. I accept that if there was such an agreement it would have had to be in writing and signed by the parties.

I do not accept his argument that the conduct of the parties after 7 December 1999 was legally inoperative. The submission was based upon a misconception of the nature and extent of the waiver on which the respondents based their case. An examination of the founding affidavit shows that they based their case on a voluntary forbearance by the appellant to enforce his accrued right to cancel the original contract on 7 December 1999. By his failure to cancel the agreement the appellant gave the respondents time, without binding himself to give the time, to perform their obligations and complete the contract. Clause 10 did not preclude the respondents from relying on this form of waiver by the appellant for their convenience.

In *Ogle v Earl Vale* [1867] QB 275, the defendant contracted to sell to the plaintiff 500 tons of iron to be delivered by 25 July 1865. He failed to deliver on the due date but held out to the plaintiff that he would deliver at some future date. He never delivered up to February 1866 when the plaintiff sued for damages for breach of contract. The plaintiff had gone to the market in February 1866 and bought the iron at a price which was higher than the contract price on 25 July 1865. He sought to recover the difference. It was argued on behalf of the defendant that the contract of sale between the parties was broken on 25 July 1865. The contention was that the measure of damages had then been fixed on 25 July 1865 and nothing subsequent

could alter that, except a fresh contract which had to be in writing as required by the Statute of Frauds. It was said that the conduct of the parties after 25 July 1865 was inoperative altogether as it did not constitute a fresh written contract.

BLACKBURN J dismissed the argument. At pp 281-282 he said:

> "There is no evidence the plaintiff ever bound himself to wait for a later delivery, or that he ever made a fresh contract … . The plaintiff, instead of insisting on his strict rights, consented to treat the defendant leniently and said, 'I'll wait, but I do not bind myself to wait'. This distinction between waiting and not binding oneself to wait, is the same as that between a mere licence and a contract, or as that between giving time to a principal by mere forbearance and binding oneself for a good consideration to give time, in which latter case only is the surety released. The question in such cases being, 'Have you ever bound yourself?'."

As the seller failed to complete the sale by delivering the iron in February 1866 notwithstanding the voluntary forbearance by the buyer, breach of the original contract was considered to have taken place at the end of the extended time.

The same principle was stated by GODDARD J in *Besseler Waechter Glover & Co v South Derwent Coal Co* [1938] 1 KB 408 at pp 416-417 when he said:

> "… if as a matter of contract the parties agree that the terms of the original agreement shall be varied the variation must be in writing. But if what happens is a mere voluntary forbearance to insist on delivery or acceptance according to the strict terms of the written contract the original contract remains unaffected and the obligation to deliver and to accept the full contract quantity still continues … . What is of importance is whether it is a mere forbearance or a matter of contract."

In *Palmer v Poulter* 1983 (4) SA 11 the parties concluded a written agreement of sale on 29 July 1980, in terms of which the appellant sold to the respondent immovable property for a purchase price of R49 000. A deposit of

R2 000 was payable on signature of the agreement and the balance of R47 000 against registration of transfer. In terms of para 1(6) of the agreement the respondent was obliged to furnish a guarantee for the sum of R47 000 on or before 10 August 1980. Clause 15 of the agreement provided that any agreement between the parties to alter or add to the "offer to purchase" would not be binding and of no force or effect unless reduced to writing and signed by the parties. The respondent paid the deposit of R2 000 required by para 1(a) of the agreement, but failed to furnish the guarantee on or before 10 August 1980. The appellant accepted payment of R2 000 as part of the purchase price on 2 September 1980. On 29 August 1980 the appellant's legal practitioner had invited the respondent to his office to sign the declaration by purchase. The respondent tendered also transfer costs. On 19 September 1980 the appellant purported to cancel the agreement on the ground that the respondent had failed to furnish the guarantee on or before 10 August 1980.

ACKERMAN J held that the "no variation except in writing" clause did not preclude the respondent from basing his case on the waiver by the appellant of her accrued right to cancel the agreement on 10 August 1980. Upholding the order by the court *a quo* directing the appellant to transfer the property to the respondent after the latter provided the necessary guarantee, his Lordship, with the concurrence of THERON J and MOLL J, said at pp 17H-18B:

> "In the instant case the reliance on waiver does not effect any variation of any term of the agreement. The respondent was still obliged to furnish the necessary guarantee. The right to cancel arising from the respondent's failure to furnish the guarantee by 10 August 1980 was solely for the appellant's benefit and it was merely this right, and nothing else, that she is alleged to have waived. Such waiver had no effect on the parties' rights or obligations, in future, in terms of the agreement. In my view, the respondent's contention, that the waiver relied upon by him involves no variation of the agreement and is therefore not subject to the non-variation clause, is squarely supported by

the decision in *Impala Distributors v Traunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T)."

In this case the appellant did not cancel the original contract on 7 December 1999 on failure by the respondents to perform their obligation within the stipulated time. He knew that the respondents had taken steps to obtain the loan of $1 300 000 from CABS. He gave his sister a General Power of Attorney to finalise the sale of the property to the respondents. His sister acted on the authority granted to her and entered into an agreement with CABS to invest the money advanced to the respondents into paid up permanent shares. The appellant's sister knew that such an agreement would meet the condition set by CABS for granting the respondents the loan. In the letter to CABS dated 10 December 1999 she said she entered into the agreement with CABS to "facilitate finalisation of the sale" of the property to the respondents. As the seller's agent she was not under any obligation to assist the purchaser to obtain a loan to pay the purchase price.

The appellant received the payment of assessed costs on 17 December 1999 without demur. He knew that the costs were tendered for the purposes of transfer of the property to the respondents.

On 14 February 2000 a *pro forma* invoice of transfer costs was sent to the respondents by the appellant's legal practitioners. They expressed their readiness to register transfer of the property. In that regard they asked the respondents to sign the declaration by purchaser. On 18 February 2000 the appellant asked the estate agents to reallocate the purchase price for capital gains tax relief. He could have done so only if he was still selling the property in terms of the original contract.

There is no purchase price when one is not selling property. The purchase price he addressed his mind to had been fixed under the original agreement.

The appellant would not have said he was cancelling the agreement on 10 March 2000 if he believed that it had been cancelled on 7 December 1999. He must be taken to have been aware of the existence of the original contract at the time he purported to cancel it. At that time the respondents were not in breach of the agreement. They had in fact completed the contract. In any case the appellant would have been bound to give them written notice to remedy their breach within fourteen days if they had been in breach of the contract.

The appeal is accordingly dismissed with costs.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

Coghlan & Welsh, appellant's legal practitioners

James, Moyo-Majwabu & Nyoni, respondents' legal practitioners