REPORTABLE (80)

Judgment No S.C. 88\2002

Civil Appeal No 261\2001

UPPER CLASS ENTERPRISES (PRIVATE) LIMITED v

(1) OCEANER t/a ENIGMA PROMOTIONS
(2) MEETING PEARSON MBALEKWA
(3) REGISTRAR OF DEEDS OFFICE

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & GWAUNZA AJA
HARARE JUNE 18 & NOVEMBER 7, 2002

I.E.G. Musimbe, for the appellant

W.J. Mutezo, for the first and second respondents

CHEDA JA: The appellant is a company duly registered with limited liability according to the laws of Zimbabwe.

The first respondent is a company duly registered with limited liability according to the laws of Zimbabwe.

The second respondent is the Managing Director of the first respondent and owner of immovable property known as No 4 of Lot 2 of Lot 54 A, Block A, Avondale.

I will refer to the parties as Upper Class, Oceaner, Mbalekwa and the Registrar.

In June 1998 Mbalekwa entered into an agreement with Upper Class in which Upper Class was to purchase for Oceaner air tickets for the sum of $321 600,00.

In addition Upper Class was to pay $45 000,00 to the National Arts Council of Zimbabwe on behalf of Oceaner. This brought Oceaner's total indebtedness to Upper Class to $366 600,00.

The above arrangement was reduced to a written agreement wherein Mbalekwa's property at Block A, Avondale, ("the property"), was mortgaged to the appellant as security for due payment of the above amount. Part of the written agreement dated 24 June read as follows:-

"2:1.The Purchaser shall pay the amounts due to the Seller as set out in Paragraph 1 of the agreement by way of two instalments.

The first instalment in the sum of $321 600,00 shall be paid on or before Saturday 27th June 1998. The second instalment in the sum of $45 000,00 shall be paid on or before Monday 29th June 1998."

The agreement also provided that in the event of default in payment the amounts would attract an interest of 36% per annum until date of payment. On signing the agreement Mbalekwa had to hand over the title deeds to the said immovable property. Upper Class was entitled, in this agreement, to have the mortgage property transferred to it at an agreed price of $350 000,00, and Mbalekwa and Oceaner would still be liable to pay in cash the difference of $16 000,00. Mbalekwa and Oceaner failed to pay within the agreed period.

In the meantime, Mbalekwa and Oceaner had issued summons against Upper Class claiming that the agreement referred to above be set aside and an order be issued declaring that the correct amount chargeable by Upper Class is $197 400,00 and that a sum of $98 700,00 be set off against the claim.

An interdict was also obtained against Upper Class to stop it from taking transfer of the property as the respondents said that it was against public policy for Upper Class to resort to what they called "self help" which removed the case from the jurisdiction of the court.

When pleadings were closed, Mbalekwa and Oceaner failed to attend a Pre-trial Conference and were held to be in default. Their claim was dismissed with costs.

In addition, the court ordered that Upper Class be given leave to enrol its counter-claim on the unopposed roll and file heads of argument in support of its claim that the agreement was valid and enforceable.

At the hearing of the application the court *a quo* found that the

agreement was a *pactum commissorium* and was invalid and not enforceable and ordered judgment for the amount owed instead.

The appeal is against this order of the court *a quo*.

A *pactum commissorium* has been defined as "a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt, after the lapse of the time fixed, the full ownership in the thing will invariably pass to the creditor in payment of the debt." See *Chimutanda Motor Spares (Pvt) Ltd v Musare & Another* 1994 (1) RLR 310, at 314, and *Van Rensberg v Wieblen* 1916 OPD 247 at 252.

The reasons why a *pactum commissorium* should not be enforced in our law are discussed in *Mapenduka v Ashington* 1919 AD 343 at 351.

In short the authorities say that a *pactum commissorium* is not enforceable in our law. See also *Sun Life Assurance of Canada v Kuranda* 1924 AD 20 at 24; *Baines Motors v Piek* 1955 (1) SA 534.

The appellant submitted that despite the general policy that a *pactum commissorium* is invalid, there should be exceptions to the policy where the creditor gives the debtor a fair price for the pledged goods. He cited the case of D.G. Kylen and A. Boraine from *The Law of Things* by Silberberg and Schoeman, 3rd Edition 1996 in support of his argument. The appellant agreed that it was only South African authorities that now seem to accept exceptions to the rule that a *pactum*

commissorium is invalid but can be held to be valid where the creditor gives the debtor a fair value for the mortgaged or pledged property. It asked this Court to make the same exception as the value was agreed in this case and it argued that it was a fair value. I do not agree. The value in this case was given by an evaluator as being between $340 000 and $370 000. This was just an estimate. There is nothing to show that the value was compared with values of other similar flats of the same size and in the same locality. It is an unsatisfactory evaluation.

CHIWESHE J, who presided over the trial, had this to say:-

> "To say that the debtor entered into the agreement willingly and voluntarily or that a fair evaluation of the property was agreed to is to miss the point altogether. The point being that the fairness and volition of the agreement is itself in doubt considering the dire position in which the debtor often finds himself in cases of this nature.
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> Accordingly I am reluctant to hold the agreement valid and enforceable. In any event, the alternative remedy sought, that of a monetary judgment will meet the justice of the case."

I see no fault with this reasoning in view of the authorities referred to earlier in this judgment.

While South Africa may have moved towards accepting exceptions to the rule that a *pactum commissorium* is invalid and unenforceable, there are no authorities to suggest that such exceptions have become part of our law in Zimbabwe.

A further important point made in *Mapenduka's* case, *supra*, is that an exception can be made provided the arrangement meets the requirement that the fair price is agreed at the time that the debt is due, not at the time the property or thing is pledged.

The debtor should be in a position to redeem the property pledged when the time for payment arrives.

In *Mapenduka's* case, *supra*, the creditor advised the debtor when the debt was due.

The debtor said he had no money to pay. The creditor then advised the debtor that in that case the debtor would keep the pledged oxen as his.

In the present case, the value of the flat was agreed to at the time of the pledge and not when the debt was due.

By the time the debt was due it was disputed by the debtor and there was, therefore, no agreement on the fair value which by then could have appreciated.

The debt itself was also disputed as the debtor questioned its legality.

There is a possibility that the debtors in this case could be prejudiced by the unsatisfactory evaluation of the property. There is no reason why the creditor, Upper Class, should insist on taking transfer of the property instead of the amount owed together with interest.

Mr *Mutezo* advised that his client Mbalekwa was able to pay. However, up to the hearing of this appeal no tender of payment was made. His clients were allowed to be before this Court to argue only on the issue of the *pactum commissorium*. They did not dispute the fact that money was owed to the appellant.

Although they have succeeded in the appeal, it has not been shown that the appellant would have refused to accept payment if the admitted amount was tendered.

In the circumstances, although they succeeded I am of the view that they should not be entitled to costs as the other party would still have had to come to court to recover their money.

Accordingly, I make the following order:

1. The appeal is dismissed.

2. Each party is to pay its own costs.

CHIDYAUSIKU CJ: I agree

GWAUNZA AJA: I agree

I E G Musimbe & Partners appellant's legal practitioners

Mutezo & Partners, first and second respondents' legal practitioners