

DEBUNKING MISCONCEPTIONS ON THE SALE OF IMMOVABLE PROPERTY BY WAY OF INSTALMENTS: THE CONTRACTUAL PENALTIES ACT [CAP 8:04]

Introduction

Uncertainty in the Zimbabwean economy has clouded most markets in the country and the property market has not been left untouched. While the sale of immovable property by way of instalments has been a gateway to the acquisition of property for some time, it has now become the norm. People wanting to acquire immovable property might not have the lump sum to pay for it but most property sellers are now agreeable to the purchase of their property by way of instalments.

This begs the question of what the seller's rights vis-a-vis those of the purchaser are and what happens should the purchaser default from paying an instalment?

This question is answered by the **Contractual Penalties Act [Cap 8:04]** (hereinafter '*the Act*'). This paper focuses on what the law provides for should a purchaser default from paying an instalment thus essentially breaching the agreement of sale.

The Contractual Penalties Act

The purpose of the Act is to provide for the enforcement of penalty clauses in contracts, to regulate the rights and obligations of parties to contracts for the sale of land by way of instalments and to provide for matters connected with or incidental to the foregoing. In a nutshell, the Act regulates what happens when a party wants to enforce a penalty clause in a contract.

A penalty clause is a section or paragraph in a contract that stipulates what sanction/punishment is to be imposed upon a party who breaches the contract.

The Act lays down the procedure of how a seller may legally cancel the agreement of sale should a purchaser fail to rectify a breach within the stipulated time.

What is an instalment sale?

Before delving into the procedure laid down by the Act it is pertinent to define what an 'instalment sale' is in terms of the Act. **Section 2 of the Act** defines an 'instalment sale' as a contract for the sale of land whereby payment is required to be made in three or more instalments or by way of deposit and two or more

instalments where the ownership of the land is not transferred until payment is complete. Any contract that falls short of this definition but requires an instalment/s to be made is not considered for the purposes of the Act.

Procedure for the cancellation of an agreement of sale

Section 8 of the Act provides for the procedure of the cancellation of an agreement of sale for an instalment sale. It provides as follows:

“No seller under an instalment sale of land may, on account of any breach of contract by the purchaser - enforce a penalty stipulation or a provision for the accelerated payment of the purchase price; or terminate the contract; or 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.”

Clearly, the first step is to notify the purchaser of the breach. In terms of subsection (2) of the section, this notice has to be in writing, advising the purchaser of the breach and asking the purchaser to rectify the breach within a reasonable time. The reasonable time can either be the time stipulated in the agreement or thirty (30) days whichever is greater.

In these circumstances the law is very clear, a period less than thirty days given to a purchaser to rectify its breach will not be considered. In the case of **Fichani & Anor v Makoni SC-02-03** it was held that the notice of cancellation of agreement given to the purchaser was short of the requirements of the Act. The Seller sent a notice of breach and after 29 days sent a notice of cancellation of agreement. The court stated that the notice of cancellation was given after 29 days therefore the notice was insufficient and failure to comply with this specific requirement of the Act was fatal.

The position by law is that a seller can only activate a penalty clause when it has given the purchaser a thirty (30) day notice to rectify the breach and the purchaser fails to rectify the breach.

What then?

There is a misconception that when a seller elects to cancel an agreement of sale the Purchaser is entitled to a refund of the money that has already been paid. Direction on these circumstances is given by **section 9 of the Act**.

Section 9 provides that:

Where upon the cancellation or termination of an instalment sale of land the purchaser is required, in terms of the contract, to forfeit—

(a) the whole or any part of any instalment or deposit which he has paid to the seller; or

(b) any claim for any expenditure he has incurred—

**(i) whether with or without the seller's consent, in protecting or preserving the land or in paying rates or taxes relating to the land;
or**

(ii) with the seller's consent, where the expenditure has enhanced the value of the land;

and it appears to a competent court that such forfeiture is out of proportion to the prejudice suffered by the seller, the court may grant such relief as it considers will be fair and just to the parties.”

Resultantly, when an agreement of sale by way of instalments is validly cancelled and there is a dispute as to whether the purchaser is entitled to a refund of the money already dispensed either party may approach the court for a position.

It should be noted that the court may only decide that the purchaser is entitled to a refund and how much such a refund should be if it is convinced that the loss of the purchaser is out of proportion with the prejudice that has already been suffered by the purchaser. In short the court will arrive at a position that it considers to be fair for both parties.

What is the take away?

The Act regulates the enforcement of penalty clauses in agreements of sale of land by way of instalments. A valid cancellation of an agreement of sale is one whereby the breaching party has been given notice to rectify its breach stipulating how much time the party has to rectify its breach; which time should not be less than thirty (30) days.

In the event that the breach is not rectified within the stipulated time the seller may validly cancel the agreement of sale. Once this is done it is up to the courts to decide on the issue of the refund if any.

BY: TATENDA ALLAN MUSUNGA