DAVID GANGE ADDENBROOKE

And

FRANCES ANN ADDENBROOKE

Versus

SHASHA ROBERT GOMEZ

And

THE REGISTRAR OF DEEDS (BULAWAYO)

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 20 MAY & 2 JUNE 2022

Civil Trial

J. Sibanda for the plaintiff
G. Nyoni for the defendant

MOYO J: Plaintiff issued summons against the defendants claiming:-

(a) An order declaring the agreements of sale by plaintiffs to 1st defendant of shares 20 and 21 Ascot Mews, Bulawayo to be null and void and of no force or effect whatsoever.
(b) An order directing the 1st defendant and those who occupy through him to vacate shares 20 and 21 Ascot Mews, Bulawayo.
(c) An order directing 1st defendant to pay occupational rental for share 20 and share 21 Ascot Mews, Bulawayo of USD2 000 monthly or its ZWL equivalent calculated from April 2018 to 31 May 2019 (the amount of $2 000 was amended by the applicant to $500 at the hearing of this matter).
(d) An order directing 1st defendant to pay the sum of US$66,70 (or its equivalent in ZWL) calculated daily from 1 August 2019 to date of

eviction. (The amount of $66,70 was amended to $19,00 at the hearing of this matter)

(e) An order directing that the amount stated in (c) and (d) above be set off against the sum of US$140 000 paid by 1st defendant to plaintiffs.

(f) An order directing 1st defendant to deliver to the plaintiffs' Deed of Transfer 3108/96 in respect of share 21 Ascot Mews upon the issue of this order.

(g) An order directing 1st defendant to return and deliver to plaintiffs the Deed of Trust for Magalena Trust registered under MA 29/96.

(h) An order declaring the renunciation and waiver of rights and benefits by plaintiffs in Magalena Trust in favour of 1st defendant null and void.

(i) Alternative relief; and

(j) Costs of suit at an attorney and client scale.

1st defendant in his plea, pleaded that in fact the properties were being sold as 2 separate properties hence the pricing per property.

The background to this matter is that plaintiffs are husband and wife and they were trustees to the Magalena Trust which owned the 2 properties at Ascot Mews being share 20 and 21. These 2 properties are the bone of contention in this dispute. The plaintiffs instructed estate agents to put up the trust for sale. Two agreements of sale were drafted wherein the 2 properties were sold to 1st defendant at USD$140 000,00 per unit meaning the total for the 2 properties would be US$ 280 000,00. The terms of these agreements were that 1st defendant will pay the purchase price for share 21 by 31 March 2018 and the purchase price for share 20 on or before 31 December 2018. 1st defendant was also given the Title Deed for share 21 and a renunciation and waiver of benefits by plaintiffs in the trust. 1st defendant paid the initial USD140 000,00 as agreed but failed to pay the balance of USD 140 000,00 by 31 December 2018.

The plaintiffs contend that the parties were not of the same mind when they contracted as they sold the trust as an entity but 1st defendant did not intend to buy a trust but intended to purchase the 2 properties belonging to the trust.

Plaintiff's case

Mr David Gange Addenbrooke gave evidence for the plaintiffs. He told the court that his wife and himself owned the Magalena Trust which owns the 2 properties being the subject matter of this dispute. He told the court that in 2017 they put the trust up for sale. He confirmed that the agreement of sale was not signed but that the property indeed exchanged hands in terms of that agreement. In other words that agreement was indeed put into practical effect by the parties. He confirmed that 2 agreements were drawn for the 2 properties and that a sum of USD140 000,00 was paid by the 1st defendant for the 1st property and that payment for the other property was to be done by 31 December 2018. He also told the court that they signed a waiver of interest in the trust in favour of the 1st defendant. H also told the court that they made a lease agreement about the rental for number 20 Ascot Mews. The rentals were meant to cover levies only. He also told the court that 1st defendant signed an acknowledgment in August 2018 acknowledging that the 1st half of the trust had been paid for and that the balance had not been paid. It was thus signed as surety against the outstanding payment. He further told the court that the balance of US$140 000,00 was not paid in terms of the acknowledgment by 1st defendant. He told the court that 1st defendant failed to honour the terms of the agreement to pay by 31 December 2018 and thus plaintiffs cancelled the agreement. He also told the court that he was claiming US$500 per month for rentals and not US$2 000 as stated in the summons. He also amended the sum of US$66,70 per day stated in the summons to $19,00 per day. He also told the court that he never received payment for rentals at all. He further stated that they had retained the agreement in USD to retain value.

Under cross-examination plaintiff confirmed that they sold a trust to the 1st defendant and that there was a meeting of the minds between them and defendant. He was further asked under cross-examination that right up to when 1st defendant failed to pay, the parties were together and he answered in the affirmative. Plaintiff was also asked under cross-examination.

"Q - as far as you understood from the beginning of the negotiations of the sale up to the time 1st defendant let you down and did not meet the payment you were still of the same mind?

Plaintiff answered saying:

A - I cannot answer that."

He however confirmed that he was still committed to the sale and that if defendant was also committed to the sale.

He was further asked the question:-

"Q - You are asking this court to set aside the agreement on the basis that you were not of the same mind.

A - No"

He further told the court under cross-examination that after 1st defendant let him down he was of the view that the consequences of 1st defendant's failure to pay meant that he should leave unite 20 and that he retains unit 21. He further told the court that he held the view that the property will then be removed from the trust and re-sold. He further told the court that he never intends that 1st defendant should lose unit 21. He further told the court that he would not want to take back unit 21 as well. He confirmed that up to the time defendant sent the balance, he had not sent any letter of cancellation. He further told the court under cross-examination that if 1st defendant had paid by 31 December 2018 he would

not have a problem. He admitted that there was no clause in the agreement of sale stating that the contract would be cancelled if 1st defendant failed to pay the balance by 31 December 2018. It was put to him that in terms of their agreement, he should have sent a letter to the 1st defendant after 31 December 2018 had passed, calling upon him to pay within 7 days or else the contract would be cancelled. He further stated under cross-examination that he was not really claiming rentals but sought to have 1st defendant pay levies and that if the levies were paid up he would not make any claim for the rentals. Those were the material aspects of 1st plaintiff's testimony.

Janine York also gave evidence for the plaintiff. She told the court that she knows both plaintiffs and 1st defendant and that she negotiated a sale between the parties. She confirmed that she prepared the agreements of sale and that 1st defendant confirmed that he would pay in USD hard currency if the currency regime changed. She further told the court that the agreements were split into 2 for convenience as per the lawyer's instructions. She told the court under cross-examination that according to her the agreement was a totally valid one.

Plaintiff's case was then closed.

The 1st defendant at the close of the state case applied for absolution from the instance. The application was dismissed and a separate judgment was written for that application.

1st defendant's case

1st defendant gave evidence in his defence. He told the court that he reacted to an advert he saw in the media. He said he dealt with Janine York the agent that was involved in the sale of the property. The initial price was a sum of $300 000,00 the properties having been $150 000,00 each. They negotiated and came to an agreement at $280 000,00 being $140 000,00 for each property. He

said there were 2 properties and it was suggested that he takes them as a trust. He agreed to take the 2 properties first paying for one property then later for the other. He said he purchased the properties through a rust. He paid immediately for number 21. He was then given the title deeds. He said he was to pay for unit 20 by the end of the year. He was not given a copy of the title deed for unit 20 as he had not paid for it in full. He said he would receive the title deed upon full payment for unit 20. He received the keys for both properties. He said there were 2 sale agreements, one for each property and a lease agreement which was to cover rates and levies. The lease agreement, however, was not signed.

He said that no issue of invalidity of the agreement was ever raised. He confirmed signing an undertaking to pay for number 20 by 31 December 2018. He said that he failed to pay by the agreed date. He paid the money in full by 15 February 2019. He said he paid to the same trust account he had paid into before. He insisted that he wanted his title deeds in relation of flat 20 as well.

Under cross-examination he stated that he bought 2 separate properties and not a trust. He was asked if plaintiff wanted to sell a trust or he wanted to buy 2 properties and he answered in the affirmative. It was put to him that since plaintiff sold a trust and he bought 2 properties then the parties were not in agreement. Under re-examination he was asked what the subject matter of the sale was and he said it was the 2 properties and that therefore their minds were together. He further admitted that he agreed with the estate agent that he would pay in US$ in the event of currency changes but that according to him there were no currency changes and that therefore he had no obligation to look for US$. He was asked if he was purchasing the properties through a trust vehicle to which he answered in the affirmative. He said there was nothing about payment of rentals in the sum of US$500 in their agreement. Defendant's case was then closed.

Claim (a) in the summons. An order declaring that agreements of sale by plaintiffs to the 1st defendant of shares 20 and 21 Ascot Mews, Bulawayo to be null and void *ab initio* and of no force or effect.

The plaintiffs contend that the sale of the 2 shares should not have been divisible but should have been indivisible and that for this reason it meant that the plaintiffs sold a trust as an indivisible share and yet the agreement made an agreement of divisible shares and that 1st defendant avers that he bought properties yet plaintiffs aver that they sold a trust. That therefore the parties were not *ad idem* hence the need to declare the agreement null and void. The plaintiffs insisted they sold a trust which owned the 2 properties. 1st defendant in his evidence in chief and cross-examination stated that he bought 2 separate properties and not a trust. A question was later put to him during re-examination.

Q - You were acquiring the properties through a trust vehicle

A - Yes

Reading through the pleadings and reading through all the documents that espouse the agreement of sale itself, the various correspondences between the parties and listening to the parties as they gave their evidence in court, it is difficult to understand how the issue of the agreement being null and void came about.

Right from the onset, it will appear plaintiffs wanted to dispose of these 2 immovable properties which were owned by the Magalena Trust. It does not seem to me that the trust owned various other properties. It appears to me that the trust owned these 2 immovable properties. In other words significantly, the 2 properties constituted the trust. If that is so, it then becomes difficult to understand how the issue of what the parties sold to each other or what was in their minds arose. I say so for right through the transaction the parties' actions

clearly showed that they were selling each other the 2 properties that were the main asset in the trust and they sold them as a trust. Even the conduct of preparing 2 separate agreements and pricing per property somehow shows that in essence what was being sold were the properties but because they were owned by a trust, it would be convenient to sell them as such. How the parties came to have an issue as to what was being sold is not clear in my view. 1st defendant although he disputed purchasing a trust in his plea, and under cross-examination, he however admitted under re-examination that he purchased the properties through a trust vehicle. I find it difficult from the totality of the facts as contained in this court record to find that the parties were not in agreement, as clearly their conduct and correspondences for a period of above a year from March 2018 to February 2019 does not at any given time, show that these parties were laboring under different beliefs. The properties were being sold as 2 shares of the trust. Under cross-examination plaintiff confirmed that they sold a trust to 1st defendant and that there was a meeting of the minds between them and 1st defendant. He was further asked under cross-examination that right up to when 1st defendant failed to pay, the parties were together and he answered in the affirmative. Another question was put to plaintiff during cross-examination that:-

> "Q - As far as you understood from the beginning of the negotiations of the sale 1st defendant let you down and did not meet the payment you were still of the same mind?
>
> A - I cannot answer that."

He however confirmed that he was still committed to the sale and that first defendant was still committed to the same. He was further asked.

> "Q - You are asking this court to set aside the agreement on the basis that you were not of the same mind?

A - No"

He further told the court under cross-examination that he was of the view that the consequences of 1st defendant's failure to pay meant that he should leave unit 20 and that he retains unit 21. He further told the court that he never intends that 1st defendant should lose unit 21. He further told the court that if 1st defendant had paid by 31 December 2018 there would not have been a problem. Clearly, from plaintiff's own views the agreement between the parties did not have issues except that 1st defendant failed to pay the 2nd $140 000,00 by 31 December 2018. I believe this is the reason why the court is also failing to understand how the parties were not of the same mind. I do not find that the contention by the plaintiff that the parties were not *ad ideim* is founded for the following reasons:-

Plaintiffs set upon a mission to sale a trust that owned 2 shares being immovable properties number 20 and number 21.

- 1st defendant was buying the 2 properties.
- The parties priced the 2 properties separately at $140 000,00 giving a total of $280 000,00.
- At all material times, parties intended to exchange ownership of the 2 shares of the trust which totaled $280 000,00 in value per their agreement.
- Plaintiff never led any evidence to support the contention that the parties misunderstood each other.
- Although 1st defendant contended that he bought properties and not a trust, he admitted under re-examination that he bought the 2 properties through a trust vehicle.
- The sum total of the evidence before me is that the parties sold each other a trust that owned the 2 properties that 1st defendant wanted to buy.

I thus do not find any material mistake or intention on the part of either party. The subject matter of the contract in my view were the 2 shares of the trust being sold as the trust since they constituted the trust. Can we in the circumstances hold that the parties were not of the same mind? I hold that is not so for the subject matter of the contract is very clear from the correspondences, the agreements and the conduct of the parties from the outset until February 2019. Even plaintiff himself told the court that he would not want to take back unit 21. He told the court that he held the view that unit 20 would then be removed from the trust and re-sold. On this point I tend to agree with 1st defendant's counsel that all was well until 1st defendant failed to pay for share number 20 by 31 December 2018. The dispute here is really that plaintiffs were not happy with 1st defendant's failure to pay the balance by 31 December 2018 and not that from March 2018 to February 2019 the parties had different intentions and therefore no consensus. I thus fail to find that plaintiffs have made a case for the setting aside of the contract on the basis that it is null and void *ab initio*. Consequently, the relief sought as paragraphs (b) to (h) fail as a result of the finding in relation to the relief sought under clause (a) for they all hinge upon the agreement being declared null and void. Although there is no specific relief being claimed vis-à-vis the breach of contract by 1st defendant in failing to pay the sum of $140 000,00 by 31 December 2018, in paragraphs 31 to 33 of the plaintiff's declaration, it is averred thus:-

> "31. The failure by 1st defendant to pay the purchase price for share 20 on the agreed date as reflected in paragraph 28 above, amounted to a material breach of the indivisible contract which rendered the entire agreement voidable at the instance of the plaintiffs.
>
> 32. Plaintiffs are entitled to an order cancelling the agreements for breach by the 1st defendant.

33. The 1st defendant is obliged to pay market rentals for his occupation of the properties as damages suffered by the plaintiffs from 1 April 2018 to date of eviction. Although this is not in the summons as a claim, neither is it in the relief , it seems plaintiff also seeks that the agreements be cancelled on the basis of the breach by 1st defendant on account of his failure to pay the sum of US$140 000,00 no later than 31 December 2018.

Although the written agreements containing the terms and conditions of the contract by the parties were only signed by the 1st defendant, it is common cause that the documents contain the terms and conditions as agreed to by the parties. Clause 14.2 provides that:-

> "Should the purchaser fail to make any payments on the due date in terms of this agreement, fail to carry out any obligations incumbent upon him under this agreement on the due date, the sellers shall have the following rights without prejudice to any other rights to which he was the entitled in law or under this agreement, namely to cancel this agreement retake possession of the property, to claim and recover from the purchaser any damages which the sellers may have sustained by reason of the aforesaid breach and subsequent cancellation by the seller.
>
> Provided that:-
>
> 13.2 the sellers shall not be entitled to aforementioned rights unless the sellers have notified the purchaser of the breach concerned and calling upon the purchaser to remedy , rectify or to desist from continuing as the case may be, the breach concerned, which shall be not less than 7 days. (my emphasis)

14.5 written notice shall be regarded as having been duly given to the purchaser for the purposes of this clause if it has been delivered by hand or dispatched by registered post to the address chosen by the purchaser …"

It is common cause that the seller never invoked clause 14 of the agreement of sale when the purchaser had failed to pay the purchase price by 31 December 2018. Instead, it appears from the letter by plaintiff's lawyers dated 7 February 2019 addressed to 1st defendant's lawyers, that is exhibit 20 in page 133 of plaintiff's bundle, the plaintiff's deemed the agreement cancelled by virtue of 1st defendant's failure to pay by 31 December 2018 and thereafter invited 1st defendant to make an offer. 1st defendant understood the correspondence to be asking him to remedy the breach so he consequently sent the sum of $140 000,00 to plaintiff's lawyers. The letter is at page 133 of the plaintiff's bundle of documents. It does not speak of any threat to cancel if 1st defendant does not remedy the breach. It reads as follows:

> "Re: Acquisition of Magalena Trust by Shasha Robert Gomes on behalf of a client David Gange Addenbrooke, we write to you in relation to your client's letter and undertaking of the 16th of August last, a copy of which we attach.
>
> Our client draws your attention to the fact that the said sum of US$140 000,00, being the purchase price share number 20 was not paid on or before the 31st of December 2018, or at any time at all. Without prejudice and based on the realities of the current currency and situation in this country, your client is invited to make an offer within 7 days of the date of this letter to purchase share number 20 of 16333 Ascot Mews, failing such response, then in that event, the offer will full away, and your client must vacate share number 20 Ascot Mews no later than the end of February 2019.
>
> Be further advised that if no response is made to this letter within 7 days or client reserves the right to obtain and regain possession of number 20 Ascot Mews through the court."

(a) The difficulties brought by this letter *vis-à-vis* plaintiff's case

It is inconsistent with plaintiff's main claim that the parties were never of the same mind. Clearly, both parties understood the crux of the sale to be the properties and not the trust itself. It appears the trust, because the properties were held through it, was the vehicle through which the properties were being sold. Again, this letter shows that the plaintiff did not have any qualms with what the parties had contracted on since it was the view of the plaintiffs that 1st defendant could forego share number 20 as a result of the purported breach but still retain share number 21. Even plaintiff in his evidence during cross-examination confirmed this aspect of their intention.

(b) This letter does not cancel the agreement between the parties.

The letter speaks to failure to pay on time and that 1st defendant shall make an offer to purchase unit 20. However, the practical difficulty is that plaintiff's assumed that failure to pay by 31 December 2018 amounted to a cancellation of the agreement in respect of share number 20. However, clearly clause 14 of the agreement of sale provides for breach by the purchaser and how the parties should proceed. The agreement dos not state that if defendant fails to pay by 31 December 2018 the agreement shall be deemed cancelled. Again, the second offer to purchase comprises a new transaction, for if a party is in breach of an agreement, the other party should follow the terms of the agreement in cancelling it. Further, in my view, the letter dated 7th February 2019 should have pointed out 1st defendant's breach and called upon him to remedy same within 7 days. Perhaps it was also going to be stated in that letter that now that 1st defendant did no pay by 31 December 2018, plaintiff now wanted to be paid in hard currency. Unit 20 had been sold

to 1st defendant and what was outstanding was payment but this letter seeks to paint a picture that the agreement relating to number 20 had somehow ceased to exist because of the breach. This was clearly a wrong interpretation of the breach clause in the agreement. It would be untenable for 1st defendant to make another offer to purchase flat number 20 simply because he had failed to meet the payment deadline without plaintiff invoking clause 14 and thereby cancelling the agreement formally through communicating as such with 1st defendant. One therefore wonders as to within which parameters of the agreement between the parties was this letter sent? I am of the view that plaintiffs' former lawyers mishandled the aspect of 1st defendant's failure to pay by 31 December 2018 as they failed to invoke clause 14 of the agreement between the parties. On the 11th of February 2019, the 1st defendant's lawyers responded through the letter at page 98 of the 1st defendant's bundle of documents stating that they awaited their client's instructions. On the 15th of February 2019, 1st defendant's lawyers wrote the letter at page 99 of 1st defendant's bundle of documents and attached to it proof of payment of the sum of $140 000,00 which had been paid into plaintiff's legal practitioner's trust account in terms of the agreement between the parties. Plaintiff's lawyers responded through the letter at page 101 of the 1st defendant's bundle of documents acknowledging receipt of the outstanding funds. Clearly, whilst it is common cause that 1st defendant breached the agreement between the parties by failing to pay the sums due by 31 December 2018, plaintiff's failed to invoke clause 14 of the agreement on what their remedy is if 1st defendant fails to perform an obligation. In cancelling a contract in the event of a breach, a party is mandated to follow the procedure provided for in the agreement to cancel it, or else the agreement is not

cancelled and it still subsists per Christie *The Law of Contract in South Africa* 6th Edition at page 562. As correctly pointed out by 1st defendant's counsel, it is settled law that if a contract specifically provides for a way to terminate it, that provision should be strictly followed or else the cancellation will be ineffective. In the case of *Minister of Public Construction and National Housing* vs *ZESCO (Pvt) Ltd* 1989 (2) ZLR 311 at page 316, the court stated thus:

> "Where parties to a contract have agreed upon a procedure for terminating an agreement, they are bound by the provisions spelling out those procedures as if they have been imposed upon them by law, and a departure from the agreed procedure will not result in an effective termination of the contract."

The same principle was enunciated in the Supreme Court case of *Zim Express Services (Pvt) Ltd* v *Nuanesti Ranch (Pv) Lttd* 2009 (1) ZLR 326 (S). The court held that failure to follow proper procedures to terminate an agreement of sale correctly meant that the agreement still subsists. I am thus unable as a result to find that the agreement between the parties was cancelled. Such a finding can only be made after the plaintiffs properly cancel the agreement in terms of clause 14. I thus hold the view that the plaintiffs have also failed to show that they are entitled to the relief they seek on the basis that 1st defendant failed to perform on time and that therefore the contract is deemed cancelled without them invoking clause 14 of the agreement between the parties. Another issue that the parties alluded to in their evidence although it is not clear from the pleadings is if the $140 000,00 paid on 15 February 2019 was in terms of the contract since it was no longer USDs. The pleadings by the parties do not clearly address this point as it is not pleaded that the amount of $140 000,00 was not only paid out of time but that it was in the wrong currency. Other than generalized submissions on the diminishing currency at the relevant time, this court was not given the

factual basis for such a contention. No currency legislation was cited to assist the court make a finding on this point as the court cannot make concrete findings on generalized averments. The only legislation that the court found which neither party alluded to is SI 33/19 which introduced the RTGS dollar and converted all USD balances that were not held in nostro accounts into RTGS balances at the rate of 1.1. The effective date of this SI was 22 February 2019 which was well after the date of payment of the US$140 000,00 by 1st defendant. I am thus unable to find that there was a currency change before 15 February 2019 when 1st defendant paid the balance. Neither party has sought to assist the court in this regard and I have had to do my own research on that point. In any event this point was never pleaded neither was any relief sought with regard thereto. Even in plaintiff's memorandum of issues page 37-38 (including issues in the alternative) of the pleadings bundle, nowhere is the issue of compliance *vis-à-vis* the currency of the date or changes to currency has been stated. I have thus failed to find for the plaintiffs in any of the claims they have made. The plaintiffs sought costs at a punitive scale against the 1st defendant on the basis that he denied obvious issues, I would have been persuaded had plaintiff succeeded in its claims against 1st defendant. With the findings I have made herein I hold the view that punitive costs against 1st defendant are not possible as it is trite that costs follow the success of a party.

The 1st defendant's claim in reconvention

Having found that the plaintiffs failed to prove the claims of the non-existence of a contract due to lack of consensus, and having found that the contract was not properly cancelled in terms of clause 14 therein, I find nothing that stands in the way of 1st defendant's claims in the claim in reconvention. It seems in my view, that whilst 1st defendant tendered payment a month later than agreed, he managed to do so before plaintiffs cancelled the contract, which

contract remains uncancelled to date in my view, therefore he must be entitled to the relief that he seeks. I am not aware of any legal impediment to a party who has been in breach, remedying their breach before cancellation of the contract. Neither have the parties referred me to any. It is for the reasons that 1st defendant's claim in reconvention should succeed.

I accordingly make the following order:

1. Plaintiffs' claims are dismissed with costs.
2. 1st defendant's claim in reconvention succeeds as follows:
   That plaintiffs surrender to the 1st defendant the original title deed in respect of unit 20 held under Deed of Transfer number 1940/97 upon return of the funds that were rejected by the plaintiffs' lawyers in February 2019.

Job Sibanda & Associates, plaintiff's legal practitioners
Nyoni Advocates Chambers c/o Mashayamombe & Co. 1st defendant's legal practitioners