CHRISTOPHER DUBE
Versus
RUTABAGA MARKETING (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 28 CTOBER 2020, 12 MAY AND 1 JULY 2021

Civil Trial

K Ngwenya, for the plaintiff
A.S Ndlovu, for the defendant

KABASA J: On 1st September 2016 the plaintiff entered into three agreements with the defendant. The first agreement related to the sale of the plaintiff's property, whose full description is stand 8140 Victoria Falls Township of Victoria Falls Township Lands. This property is held under title deed number 1816/2014. The second agreement related to a deed of cession and assignment of stand 1537 Victoria Falls Township measuring 5, 195m^2, which stand had been offered to the plaintiff by virtue of his position as Town Clerk of the Victoria Falls Town Council. The third agreement related to the construction of town houses on these two stands. The defendant was to build seven (7) town houses for the plaintiff on stand 8140 and 2 (two) town houses on stand 1537. The townhouses were to be built by 1st September 2018, failing which the defendant was to pay US$600 000 to the plaintiff by no later than 7th September 2018.

The townhouses were not built as agreed and the US$600 000 was not paid by the agreed date. On 8th January 2019 the plaintiff issued summons claiming the following: -

1. "A declaratory order that the Agreements of Sale entered into between plaintiff and defendant for stand 8140 Victoria Falls Township of Victoria Falls Township Lands and stand 1537 Victoria Falls Township of Victoria Falls Township Lands are cancelled.
2. An order for the return of the Title Deed number 1816/2014 in respect of stand 8140 Victoria Falls Township of Victoria Falls Township Lands.
3. An order that the US$150 000 payment made by the 1st defendant on behalf of the 2nd defendant offsets the general damages suffered by the plaintiff so as to cover the loss plaintiff incurred as a result of the breach of contract.
4. Cost of suit at an attorney-client scale."

The first defendant, one Stewart Philip Cranswick had been cited as a party by reason of his involvement in negotiating the agreements at the time when the company had not yet been formed. An exception was subsequently filed objecting to the citing of the first defendant. The plaintiff then filed a notice of withdrawal, withdrawing his claim as against the first defendant. The action thereafter proceeded against the current defendant. This explains the reference to first and second defendant in paragraph 3 of the plaintiff's prayer.

In response to the plaintiff's claim, the defendant confirmed the signing of the three agreements on 1st September 2016. The defendant however denied that the building of the townhouses was a condition tied to the Agreement of Sale of the stands. On the contrary the plaintiff was paid US$150 000 towards the properties and the agreement relating to the townhouses construction expressly stated that in the event that construction did not take place the defendant was to pay US$600 000 by no later than 7th September 2018 less the deductions referred to in clauses 2.2 of the Agreement of Sale. That amount was tendered in terms of the agreement. The plaintiff did not give the appropriate notice as provided for in the same agreement. He therefore cannot seek cancellation of the agreement as the defendant has duly performed as per the terms of the agreement.

In reconvention the defendant sought an order compelling the plaintiff to accept the tendered payment of ZW$600 000. The tendered ZW$600 000 was in compliance with the law as per the provisions of SI 33 and SI 142. The defendant also sought for costs on a legal practitioner and client scale.

With the closure of pleadings, the parties attended a Pre-Trial Conference at which the following issues were referred for trial: -

1. Whether or not the defendant breached the Agreement of Sale and or cession and assignment agreement and or the agreement of construction of the town houses.

2. If so, whether or not plaintiff is entitled to a claim for cancellation of the agreements and the remedial thereof (sic).

3. Whether the defendant is entitled to such specific performance and the plaintiff obligated to accept the sum of ZW$600 000 as per the express terms of the agreement for construction of townhouses.

4. Whether or not both properties have been transferred to the defendant.

An admission was also sought from the plaintiff, which admission was made, that the plaintiff received US$150 000.

At the trial the plaintiff abandoned the claim wherein he was seeking to have the US$150 000 set off against the claim of general damages he sustained as a result of the breach of contract.

The court thereafter heard evidence from the plaintiff who was the only witness. The gist of his evidence was that he entered into a partnership agreement with the defendant which entailed the building of townhouses on his two stands, 8140 and 1537. 8140 he held title to and 1537 he was offered by his employer as a condition of service. The title deed for stand 8140 was produced as exhibit 1.

Thirty (30) townhouses were to be built on stand 8140 and he was to get 10 with his contribution being the piece of land. On stand 1537six(6) cluster houses were to be built and he was to get 2. The title deed for stand 8140 was however encumbered, Mr Cranswick who was representing the then yet to be incorporated defendant advanced him US$150 000 to pay off what was owed at the bank. This would then reduce the townhouses he was to get from 10 to 7. The parties then signed an Agreement of Sale for stand 8140 whose value was US$775 000. The company was subsequently incorporated and the Certificate of Incorporation was duly produced as exhibit 2, and the CR 14 as exhibit 3. The Agreement of Sale was produced as exhibit 5, with the agreement for the construction of the townhouses thereon produced as exhibit 4.

The agreement of sale put the purchase price at US$233 000 but that was never paid as it was never meant to be paid. It was just to facilitate the building of the town houses.

The deed of cession for stand 1537 where 6 cluster houses were to be built was produced as exhibit 6, with the plaintiff explaining that all 3 agreements were inter-related. None of them could be consummated to the exclusion of the other.

The town houses which were to be built by 1st September 2018 were not built and the US$600 000 was not paid by due date.

The witness's evidence was largely common cause. The issue to be resolved hinged on the interpretation of these 3 agreements and whether stand 1537 was the plaintiff's to cede.

Under cross-examination the plaintiff conceded that stand 1537 belongs to the Victoria Falls Municipality and, in a letter, dated 5 December 2016 that stand was offered to the defendant. The right to take title in that stand therefore reposes in the defendant.

The plaintiff's explanation that he had been offered the stand at US$75 000 and of the US$150 00 that was advanced to him by Mr Cranswick, US$21 00 was to be utilized to pay the 25% purchase price to Council does not change the fact that he never took title as according to him;

> "The Director of Housing did not cede the stand to the defendant as per an internal memo but he instead offered it which was a procedural anomaly. It was not an offer."

The fact is stand 1537 was allocated to the defendant. Documentary evidence in the form of a letter from the Director, Housing and Community Services and produced as exhibit 9 put to rest any claim the plaintiff had to stand 1537.

It was not lost to the court that the plaintiff when asked: -

"Confirm currently right to take title and interest in 1537 is with the defendant," responded thus: -

"Yes, for now."

This response appeared to suggest that the plaintiff intends to have that corrected. Whether he will succeed or not is not an issue that I need to exercise my mind on. Until the plaintiff successfully reverses the allocation of the stand to the defendant, such allocation stands.

As regards stand 8140 there is no dispute no townhouses were ever built thereon.

If, as suggested by counsel for the defendant in cross-examining the plaintiff, the agreement of sale meant that the defendant could do as it pleased on that stand as benefit and risk had passed to it in terms of the agreement, why did the defendant agree to build the 7 townhouses failing which to pay US$600 000 to the plaintiff?

This tends to support the plaintiff's contention that the agreements were inter-related. Still on this point counsel for the defendant suggested to the plaintiff that since construction did not happen, the remedy lay in the payment of US$600 000 and the defendant tendered the Z$600 000 in terms of the law.

However, it is important to note that the letter dated 15th October 2019 which was produced as exhibit 7 in which the plaintiff's lawyers were acknowledging the contents of a letter from defendant's lawyers of the 28th August 2019, spoke to events which happened after the 7th September 2018, the date when the US$600 000 ought to have been paid.

The ZW$600 000 was rejected, the reason being that by virtue of SI 33/2019 this amount was now being paid in Z$ at the rate of 1:1 with the US$. Had this payment been tendered by no later than 7th September 2018 and SI 33/2019 was already in force, the defendant's argument would hold water. This was not the case and so the issue was whether the defendant could tender the ZW$600 000 and hold itself as complying with the terms of the contract notwithstanding the fact that such tender was made outside the agreed time frame.

If the defendant breached the contract by failing to build the townhouses and equally failing to pay the US$600 000, what remedy was available to the plaintiff?

An application for absolution from the instance was made after the plaintiff closed his case. That application was dismissed as I was of the view that the plaintiff's case could not be described as so hopeless to an extent of sparing the defendant the trouble of presenting his defence to the claim.

It was therefore important that the defendant defends the claim.

Mr Cranswick, one of the defendant's directors was the only witness for the defendant. His evidence was to the effect that when he met the plaintiff, he (plaintiff) had a residential stand he was ceding and an industrial property he was selling. However, his offer from Council for the residential stand had expired and so he (Cranswick) took over and dealt directly with Council. He was then offered stand 1537, as more fully appears on exhibit 9 and duly paid the purchase price for 1537.

As regards stand 8140, the plaintiff was experiencing financial problems and the title deed was encumbered as there was a mortgage bond against it in favour of CBZ. He then

gave the plaintiff US$150 000 which was to go towards paying off the CBZ loan and the other debts he had. This amount was essentially part of the purchase price. The total amount was US$203 000 less the debt plaintiff owed him and statutory payments for the transfer of the property. He duly paid the amount in full.

The witness thereafter explained how and why the agreement for the construction of town houses came about. It was his evidence that the plaintiff was not too happy and after protracted discussions they agreed that defendant would build townhouses for him. These townhouses were the defendant's idea and would go towards payment of the balance of the purchase price of US$600 000 and"*in lieu* of the townhouses if we failed to develop them we would pay the US$600 000."

The defendant would either deliver the townhouses by September 2018 failing which it would pay the balance of the purchase price per clause 2 of Exhibit 4 (the agreement for the construction of town houses).

This clause reads: -

> 2. "In the event that the Constructor, for any reason whatsoever, should fail to build the townhouses on stand 8140, it shall, by no later than 7th September 2018, pay Dube the sum of US$600 000 less deductions as referred to in clause 2.2 of the agreement of stand 8140."

The townhouses were not built and so the balance of the purchase price had to be paid. That balance was tendered on the due date but the plaintiff was not happy about it. He offered to pay back the US$150 000 but by then the law had changed. The witness was not prepared to accept the US$150 000 as ZW$150 000.The plaintiff was equally not prepared to go back to the original agreement. There was a stalemate and the plaintiff then issued summons.

Under cross-examination the witness prevaricated in a manner that cast doubt on his credibility. He had problems responding to questions relating to the purchase price for stand 8140 and to the terms agreed on for the construction of townhouses.

He signed the agreements and yet appeared unsure of what US$600 000 was for and the full purchase price for stand 8140.

He eventually agreed that the US$600 000 was the value of the townhouses to be built on stand 8140 and that is why US$600 000 was to be paid *in lieu* of the townhouses.

The witness again prevaricated in responding to questions relating to whether the US$600 000 was paid on the agreed date.

The following exchange illustrates the extent of such prevarication: -

Q - "1/9/2018 you failed to build so did you pay the US$600 000 as per agreement.

A - We tendered.

Q - When did you make the tender.

A - I cannot remember the date.

Q - Any documentation you tendered before 7/9/2018.

A - Not sure.

Q - There was never tender of US$600 000 before 7/9/2018.

A - I do not dispute that.

Q - So you breached the agreement you had with plaintiff, failed to construct by 1/9/2018 and failed to pay the US$600 000 by 7/9/2018.

A - May I confer with my legal practitioner.

Q - Answer the question. You should know.

A - It was tendered and refused numerous times.

Q - Do you agree no payment of US$600 000 was made before 7/9/2018.

A - I agree.

Q - Agree that you have not fulfilled any of the conditions as per Exhibit 4.

A - I do not. I tendered full payment.

Q - Confirm no construction of townhouses on both stands.

A - I confirm.

Q - Confirm that the construction of the townhouses should have been done by 1/9/2018.

A - Yes

Q - It was never done.

A - Yes

Q - Confirm failure to so construct by 7/9/2018 obliged you to pay plaintiff US$600 000.

A - No

Q - When were you obliged to pay it

A - No date

Q - Read clause 2 on page 7 of Exhibit 4.

A - I was obliged to pay by 7/9/2018.

Q - So you didn't as defendant's representative meet any of the conditions as per agreement, Exhibit 4.

A - Yes I agree."

The foregoing clearly showed what an unreliable witness Mr Cranswick was. He had problems admitting to the obvious, until the inescapable truth was thrust at him in the form of documentary evidence.

It was therefore clear that there was a breach of contract. Which contract was breached? Does the plaintiff's remedy lie in the cancellation of the agreement of sale and the return of the title deed for stand 8140? In light of the breach of contract is the defendant entitled to an order for specific performance, such specific performance being an order to compel the plaintiff to accept ZW$600 000 in full and final settlement of the defendant's obligations?

WHICH CONTRACT WAS BREACHED?

The 3 agreements were signed on the same day, that is 1st September 2016. The evidence of the plaintiff and Mr Cranswick clearly shows that the full purchase price for stand 8140 was not US$233 000 but US$750 000, comprising of the US$150 000 paid as deposit and the US$600 000 to be paid *in lieu* of the townhouses.

Ms Ndlovu for the defendant referred to the case of *Runatsa* v *Rumani Estates (Pvt)Ltd and Others* 2009 (2) ZLR 286 (S) where the court spoke on the question of interpretation of contracts. The intention of the parties as expressed in the agreement is what the court should look to.

The Agreement of Sale of stand 8140 talks of a deposit of US$150 000. There is no mention of payment of the balance. That balance is mentioned in the agreement on construction of townhouses, either 7 townhouses or US$600 000.

The Agreement of Sale can therefore not be taken as a stand-alone as it finds completion in the agreement on construction of townhouses.

The defendant could not possibly build townhouses for the plaintiff on a land it had paid the full purchase price for and allow itself to be bound to pay US$600 000 should it fail to build the townhouses when it had paid the full purchase price for that land. It makes no sense.

In *Worman* v *Hughes and Others* 1948 (3) SA 495 A at 505, a case referred to in the *Runatsa* case (*supra),* the court had this to say: -

> "It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e., what their intention was as expressed in the contract."

The inter-connectedness of the agreements finds expression in clause 2 of the "construction agreement." In the event that 7 townhouses were not built, US$600 000 was to be paid less deductions as referred to in clause 2.2 of the Agreement of Sale of stand 8140.

Clause 2.2 related to the deposit of US$150 000 and the balance which was to remain after deductions relating to the statutory payments and costs of drafting of the agreement of sale and cession agreement for stand 1537.

This agreement was signed on 1st September 2016 with the balance payable by the purchaser 24 months after the signing of this agreement. The townhouses or US$600 000 payable *in lieu* thereof were to be constructed or paid by 1st September 2018, which was 24 months from 1st September 2016. It cannot therefore be clearer that the balance which found expression in the construction agreement amounted to the US$750 000 being the value of stand 8140.

A breach of the construction agreement would amount to a breach of the Agreement of Sale as the full purchase price of stand 8140 would therefore not have been paid.

Was this however an instalment sale of land within the purview of the Contractual Penalties Act, Chapter 8:04? Counsel for the defendant submitted that in the event that the court finds there was a breach of contract, the plaintiff failed to give a valid notice of the breach in terms of the Contractual Penalties Act, Chapter 8:04.

Section 7 of the Act states that proof that a contract was an instalment sale of land rests on the person alleging its existence. *In casu* it rests on the defendant.

The requisite notice where a seller alleges breach of contract is provided for in section 8 of the Act. The section reads: -

> "No seller under an instalment sale of land may, on account of any breach of contract by the purchaser –
>
> (a) enforce a penalty stipulation or a provision for the accelerated payment of the purchase price, or
> (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."

This provision will only apply where it is an instalment sale of land. An instalment sale of land is defined as: -

> "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."
>
> (See *Zimbabwe Reinsurance Company Ltd* v *Musarurwa* HH 141-2001)

In casu a deposit of US$150 000 was paid and the balance was to be paid 24 months after the signing of the agreement. It is important to note that the agreement did not say payable in instalments spread over 24 months. The clear and unambiguous meaning is that the whole balance was payable after 24 months. This means the payment was the deposit and the US$600 000 *in lieu* of the 7 townhouses. This amounts to one instalment or payment and therefore does not come within the meaning of instalment sale of land per the Contractual Penalties Act.

The breach of the construction of townhouses agreement meant the breach of the Agreement of Sale as the full purchase price was not paid by due date.

DOES THE BREACH EXTEND TO STAND 1537

The plaintiff accepted that he did not meet the requirements of the offer extended to him by the Victoria Falls Municipality. The stand was then offered to the defendant and exhibit 9 provided proof of this fact.

That being the case the issue of the 2 cluster houses that were to be built on stand 1537 falls away, so too does the claim for cancellation of the deed of cession and assignment. This agreement had a still birth as it was in anticipation of the plaintiff fulfilling his obligations with the Municipality, acquiring the rights, title and interest in 1537 and then ceding same to the defendant. This did not happen and the uncontroverted evidence was that defendant then acquired the stand and paid for it.

In any event the US$21 000 which represented 25% of the purchase price of 1537 had been paid by the defendant from the US$150 000 given to the plaintiff.

The plaintiff's evidence appeared to dwell on stand 8140 and with good reason as he is yet to "reverse" what the Director of Housing and Community Services did when he allocated the stand to the defendant.

WHAT IS THE PLAINTIFF'S REMEDY

The plaintiff could elect to cancel the agreement or the contract or seek an order for specific performance. He elected to cancel the Agreement of Sale and an order for the return of the title deed for stand 8140.

Counsel for the plaintiff persuasively argued that the agreements are inter-connected. I refer here to the sale of stand 8140 and the construction of townhouses agreements as 1537 is now out of the equation.

After my finding that the Contractual Penalties Act does not apply, does that mark the end of the matter? Unfortunately not.

I say so because the Agreement of Sale of stand 8140 specifically provided that: -

14:1 "If either party should commit a breach of any term of this Agreement (the defaulting party) the other party (the aggrieved party) shall deliver a written

> notice to the defaulting party specifying the nature of the breach and calling upon the defaulting party to remedy the said breach with 14 days (sic) failing which the aggrieved party shall be entitled to either,
>
> a) cancel this Agreement, or
> b) enforce specific performance of all terms and conditions of the Agreement.
> c) In either case to claim damages where they may been sustained."

Such written notice was not given in terms of the parties' agreement. The plaintiff cannot seek to rely only on the agreement for the construction of townhouses in moving for relief and ignore the requirement for notice in the Agreement of Sale he seeks to have cancelled as a consequence of the breach. I find it disingenuous to seek to distinguish the construction agreement and the Agreement of Sale of stand 8140 only in so far as the remedy is concerned whilst ignoring the express terms in the agreement of sale providing for what an aggrieved party ought to do before cancelling the agreement.

The plaintiff can only cancel the agreement after complying with clause 14:1 of the Agreement of Sale of stand 8140.

That remedy is therefore available but only after due notice in writing is given. To hold otherwise is tantamount to imposing the court's own terms on the contracting parties.

As PATEL JA put it in *Magodoraand Others* v *Care International Zimbabwe* SC 191-13.

> "It is not open to the courts to rewrite a contract entered into between the parties or excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy."

I would say this extends to the terms or conditions the contracting parties agreed to in the event of a breach and either of them wants to cancel such contract.

As to whether both stands 8140 and 1537 have been transferred to the defendant, no such evidence was led and I will not unduly exercise my mind on this issue.

Turning to the defendant's counter-claim where it seeks an order to compel the plaintiff to accept the ZW$600 000.

> "The court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance on his part (Lawson, s 472, p 522). A party is not entitled to specific performance where he has failed to show that

he has performed in terms of the contract." (*Wolpert* v *Steenkemp* 1917 AD 493 at 499).

In *Grandwell Holdings (Private) Limited* v *Zimbabwe Mining Development Corporation and 2 Others* SC 5-20, MATHONSI JA had this to say: -

> "As to the remedy of specific performance in the law of contract, it is accepted that it is aimed at upholding the contract and obtaining the performance of the terms of the contract as agreed. Indeed, specific performance is the primary or default remedy for breach of contract and is usually claimable.

According to the learned author I Maja, *The Law of Contract in Zimbabwe*, 2015, *The Maja Foundation*, at p 126:

> "The general rule under Roman Dutch Law is that an innocent party has a right – in every case of breach of contract – to a remedy of specific performance unless there are exceptional circumstances which justify refusal of an order for specific performance."

The learned JA goes on to say: -

> "However, the right to claim specific performance is predicated on the concept that the party claiming it must show that he or she has performed all his or her obligations under the contract or is ready, willing and able to perform his or her side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance."

In casu the defendant did not perform its obligations under the contract. The full purchase price of stand 8140 was not paid as the US$600 000 which was to be paid by 7/9/2018 after a failure to construct townhouses was never paid.

How can a party who has failed to meet their end of the bargain to the detriment of the other, seek to compel the other to accept that which was not rendered on due date, especially in the particular circumstances of this case?

This is not a case which cries out for the court to exercise its discretion in favour of the defendant. It is tantamount to adding insult to injury for the defendant to seek specific performance under the circumstances.

The defendant is not entitled to the relief it seeks.

Each party has asked for punitive costs. There has been no outright winner in this case. I am of the considered view that this is a case which demands that each party bears its own costs.

In the result, I make the following order: -

1. The plaintiff's claim be and is hereby dismissed.

2. The defendant's counter-claim be and is hereby dismissed.

3. Each party shall bear its own costs.

Dube, Nkala & Company c/o T.J Mabhikwa and Partners, plaintiff's legal practitioners
Webb, Low & Barry (Inc Ben Baron & Partners), defendant's legal practitioners