TENDAI NYATSANGA
versus
EGNIA JESSICA SHONGORISHO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 10, 22 June & 12 October 2016

CIVIL TRIAL

T C Hungwe, for plaintiff
P Kwenda, for defendant

TAGU J: The undisputed facts in this matter are that the plaintiff and the defendant entered into an Agreement of sale whose terms obliged the plaintiff to pay a purchase price of Z$14 million and the defendant was to effect transfer into plaintiff's name of a residential Stand No. 88 of Lot 358 of Prospect, Harare measuring 2000 square metres. The agreement of sale was signed on the 12th January 2007. In terms of the Agreement the plaintiff was to pay costs of transfer including stamp duty, conveyancing fees and transfer fees within fourteen days of receiving a profoma statement from the Seller's conveyancers. The plaintiff duly paid the full purchase price in cash as agreed on the 12th January 2007, fulfilled all his other obligations in terms of the Agreement of Sale and awaited a profoma statement in terms of Clause 7 of the Agreement of Sale. When no profoma statement came from the Seller's conveyencers, the plaintiff made several attempts to get one to no avail. The plaintiff was being given several and varied excuses. When fed up with the reactions of the defendant the plaintiff on 24 October 2008 instituted proceedings before this Honourable Court seeking for an order to compel the defendant to take all steps necessary to effect transfer of the said property in terms of the Agreement of Sale.

On 3rd March 2009 the defendant filed a plea to the plaintiff's claim wherein she made known for the first time that she had not acquired the title of the property that she had sold to the plaintiff and therefore could not be able to pass transfer in terms of the Agreement of Sale.

At the pre-trial conference the defendant moved for the joinder of an unnamed property developer who was not part of the Agreement of Sale and the plaintiff also made an application for the amendment of his summons to add an alternative claim of payment of an

amount of US$ 50 000.00 (current value of the same stand) being compensation as specific performance had become an apparent impossibility.

The issues referred for determination are-

(1) Whether the defendant should be compelled to take all necessary steps to effect transfer of Stand 88 of Lot 358 Prospect, measuring 2000 square metres to the plaintiff?

(2) Whether the plaintiff is alternatively entitled to US$50 000.00 as compensation in the event that specific performance is impossible?

The plaintiff alone gave evidence in his case.

In his evidence the plaintiff narrated how he entered into the Agreement of Sale and the several efforts he made to have the said Stand transferred into his names without success. He told the court that he has since realised that it is impossible for the defendant to transfer the title, rights and interests in the said Stand into his names. He is now interested in being refunded his money that he paid. He told the court that the money he paid was in Zimbabwean currency. It was his evidence that he went to the Reserve Bank of Zimbabwe and he was given a copy of the exchange rates prevailing at the time he bought the Stand. He told the court that as at 12th January 2007 Z$250.00 was equivalent to US$1.00 which gives him an amount of US$56 000.00 after converting the Z$14 million. He told the court that he now wants to be compensated to the tune of US$ 50 000.00 which is the current value of the same Stand on the market. He said he consulted an Estate Agent who is selling residential Stands in Prospect, Harare, along Kripps Road who gave him a range of US45 000.00 for same Stand for cash to US$50 000.00 on terms.

It was brought to his attention that the defendant was willing to compensate him with an unserviced stand measuring 2000 square metres at City of Harare selling rates and the plaintiff rejected the offer because he had purchased a serviced stand. Under cross-examination it was again put to him that the defendant did not refuse to transfer the property but that the plaintiff had not been to Sakutukwa & Partners for the transfer. His response was that he did not agree with that because many years elapsed when he was asking for the land hence he now wants his refund. He said at first he wanted transfer of the land but due to time lapse he now wanted his money back so that he can look elsewhere for another stand.

The defendant gave evidence and called one witness a Mr Onisimo Chitauro Mudzivare.

In her evidence the defendant admitted that she sold the land in question to the plaintiff on the terms and conditions mentioned by the plaintiff. She admitted that when she sold the said land she had no title over that land. However, she said the land was not serviced but was a virgin land. On the plaintiff's claim her evidence was that she was willing to go and sign the papers to effect transfer into the plaintiff's names. Her defence was basically that she was still waiting for papers from her lawyers Sakutukwa & Partners. She told the court that she cannot pay the compensation of US$50 000.00 because the agreement is still on and that she is willing to issue him a stand. However, in the event that she is ordered to pay money she said she is willing to pay US$ 8 000.00 which she said is the market value and the forced value is US$7 000.00. Be that as it may the defendant refused to answer several pertinent questions under cross-examination.

Mr Onisimo Chitauro Mudzivare told the court that he is employed by Bevkin Real Estate as a sales manager. He told the court that he is not a registered estate agent. However, he said he was approached by Mr Kwenda to go and evaluate the land in question. When he got at the general area he could not identify the piece of land in question. The defendant just pointed at some area between Masotsha Ndlovu Road and another road. He saw a vast virgin land without any proof of servicing. He then evaluated that area and came up with an open value of $ 8000.00 and forced value of $ 7 000.00. He produced exhibit 4 which he evaluated. Under cross –examination it was put to him that the land in question is currently valued at $50 000.00. His response was "I dispute that. It is about $25 000.00 for serviced 2000 square metres up to $35 000.00 for some. In Borrowdale one and a half acres cost $60 000.00".

At the close of the case both sides filed their written closing submissions.

In his closing address the counsel for the plaintiff urged the court to note that the plaintiff's claim is based on a contract of sale. He said the Summons is for a claim to order the defendant to perform a specific act in pursuance of a contractual obligation. He further submitted that the alternative claim sounds in money in respect of compensation or damages in the event that specific performance is impossible. For this proposition counsel for the plaintiff relied on the case of *Farmers's Co-op Society (Reg)* v *Berry* 1912 AD 343 at 350 where INNES J stated-

> "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by KOTZE CJ in *Thompson* v *Pullinger* (1894) 1 OR at p. 301, 'the right of a plaintiff to the specific

> performance of a contract where the defendant is in a position to do so is beyond all doubt.' It is true that Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purgue his default by the payment of money. For in the words of Storey (Equity Jurisprudence, sec 717 (a)), 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it'. **The election is rather with the injured party**, subject to the discretion of the Court". [Emphasis made]

He concluded by saying that the *maxim lex non cogit impossibilia* dictates that specific performance cannot be ordered if compliance is impossible where a litigant in the position of defendant cannot perform an obligation due to legal impossibility or a supervening impossibility. He said in such situations the court is bound to order restitution or compensation. Such was the case in the matter of *Benkenstein* v *Neisius* 1997 (4) SA835 (C) wherein an order was made compelling the defendant to take all steps necessary to procure transfer of the property in question yet the property was co-owned. The court held that compliance with the order would be impossible if the co-owners refused to cooperate. An order of the court must be legally enforceable against the seller and where a third party who is not privy to the contract is involved the buyer will have to be content with the claim for damages. See *Rissik* v *Pretoria Municipal Council* 1907 TS 1024 at 1037.

On the other hand the counsel for the defendant submitted among other things that the defendant has not resisted plaintiff's claim for transfer. He said the defendant is willing to cede all her rights and interests in the property to the plaintiff. He referred for such proposition to the case law cited at page 579 of *The Law of Contract South Africa* by RH Christie 3rd edition where the case of *Farmers' Co-op Society (Reg)* v *Berry supra* was cited. In his views the counsel for the defendant submitted that the plaintiff is not entitled to damages without cancelling the agreement. Further, he said Christie at p 587 said-

> "The damages must be pleaded and proved as in any other case, the court having no jurisdiction to make a punitive award as an inducement to perform. Nor will the court award the estimated cost of making good the defendant's failure to perform, in the absence of proof of the plaintiff's loss."

In casu the plaintiff managed to prove beyond doubt that he performed his obligations per the terms of the Agreement of Sale and that the defendant failed to fulfil her obligations. The plaintiff managed to prove that he paid a total of Z$14 million to the plaintiff as per exhibit 2.The plaintiff told the court that at first he was claiming for specific performance of

the contract on the party of the defendant. However, taking into account the defendant's plea he realised that it was impossible on the party of the defendant to carry out the terms of the Agreement hence he amended his summons to claim an alternative relief of compensation or refund of his purchase price. Again he realised that the amount was paid in Zimbabwean dollars which have since been discarded as legal tender. He now wants to be paid the equivalent basing on the exchange rate prevailing at the time he purchased the said stand.

My analysis of the defendant's evidence is that she is in essence not opposing the claim by the plaintiff. However, she wants to pass ownership that is right, title and interest in the said stand to the plaintiff. She objected to the idea of paying damages of US$ 50 000.00. In her view she is prepared to pay an amount of between US 7000.00 and US$8 000.00 in the event that the court orders her to pay.

The court was however, convinced by the plaintiff that it is impossible to order the defendant to pass on title, interests and rights to the said stand to the plaintiff. Such an order will be impossible to perform on the party of the defendant. In her own plea the defendant said that she cannot sign the said necessary documents to pass transfer as she awaits transfer from the previous owner of the stand. In her evidence- in- chief and under cross-examination she conceded that she does not have title to the said stand. Worse still when she went with her own witness Mr Oswell Mudzivare she was unable to pin point the exact stand that she purportedly sold to the plaintiff. In my view the only enforceable remedy available to the plaintiff which is enforceable is for the defendant to refund the purchase price. The plaintiff managed therefore to prove on a balance of probabilities the current value of the same stand. The plaintiff's alternative claim was therefore proved and the court will dully award the plaintiff the relief he is seeking.

In assessing a refund to the plaintiff the court will take into account the rate of exchange stated by the plaintiff. However, the plaintiff did not produce documentary evidence to prove the same. The witness for the defendant gave an estimated value of a serviced stand in the region of US$ 25 000.00 to US $35 000.00. The court will take judicial notice of the fact that market value of serviced stands is plus or minus US10.00 per square metre depending on the area. In my view a figure of US$ 40 000.00 is reasonable.

In the result it is ordered that-

1. Defendant shall pay the plaintiff the sum of US$ 40 000.00 together with interests on that sum at the prescribed rate from date of summons being refund of the purchase price of stand 88 of Lot 358 of Prospect, Harare, measuring 2000 square metres.

2. The costs of this suit shall be paid by defendant on a legal practitioner and client scale.

Venturas and Samukange, plaintiff's legal practitioners
Kwenda and Associates, defendant's legal practitioners