SIBONGILE KAZIBONI
versus
CHAMPION CONSTRUCTION (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 26 February 2013, 27 February 2013 and 13 March 2013

F.R. Mugabe, for the plaintiff
H.K.H. Mapondera, for the defendant

Civil Trial

MATHONSI J: At the conclusion of the trial in this matter, the parties requested to file written submissions. I directed that the plaintiff's closing submissions be filed by 7 March 2013 while those of the defendant should be filed after that. I have only had sight of the defendant's closing submissions but those of the plaintiff have not been brought to my attention.

The plaintiff sued the defendant, a construction company and land developer for specific performance, that is, for an order compelling the defendant to complete the construction of a house on stand 3187 of subdivision A of 159 Prospect or alternatively for an order that the defendant pays the costs for the completion of construction of the house in question. She also sought an order for the transfer of that property to herself and costs of suit.

In her declaration the plaintiff averred that on 3 November 2006 the parties signed an agreement in terms of which the defendant sold stand 3187 of subdivision A of 159 Prospect (the property) to herself. The purchase price of $42 500 000-00 (Zimbabwean currency) was to be paid by a deposit of $19 150 000-00 with the balance of $23 350 000-00 being paid in due course.

The plaintiff averred further that the defendant was required to construct a house on the stand for the plaintiff as described in the agreement of sale using the purchase price paid by the plaintiff. She averred that she duly paid the purchase price and the defendant commenced

construction about November 2006 but in breach of the agreement between the parties, it failed to complete the construction within the agreed period of 6 months.

Outstanding construction work relates to floors, scheming and painting, plastering and decorating the ceiling, plumbing, fittings, electrification, fitting of doors and painting them, walling, sliding gate, driveway and gutters. It is this outstanding work which the plaintiff would like the defendant to complete.

In its plea to the plaintiff's claim, the defendant averred that the plaintiff failed to comply with the agreement of the parties in that she did not pay the deposit of $19 150 000-00 within 48 hours from the date of signing the agreement as required by that agreement, she failed to pay the full purchase price by 15 November 2006 in breach of the agreement, made payment to Fingold Real Estate instead of paying to the defendant directly and also failed to pay interest on outstanding amounts.

The defendant averred that the failure to complete construction within 6 months was occasioned by the fault of the plaintiff who refused to provide construction material provided for in the agreement. It maintained in paragraph 3 of the plea that;-

> "The only construction work that remains undone is that which requires these materials (i.e those set out in clause 2 viii, of the agreement). It is therefore denied that the defendant has failed to deliver to the plaintiff a complete dwelling within six months of November 2006 and the plaintiff is put to the strictest proof of the contrary."

The defendant went on in paragraphs 5 and 6 of the plea to aver;-

> "5. Ad paragraph 7
>
> The defendant avers that the breach is the result of factors beyond its control. The defendant has been unable to undertake walling owing to a death (sic) of cement on the market. The little supplies the defendant has managed to receive have been used to complete plastering of the dwelling.
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> The fitment of doors, locks, electrical installations, scheming and painting are conditioned on glazing being completed first. The plaintiff has been reluctant to comply with clause 2 (viii) and provide the defendant with the material necessary to the glazing of the dwelling.
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> 6. Ad Prayer
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> The main and alternative relief being sought by the plaintiff is untenable. Plaintiff cannot demand that defendant perform its obligations under the agreement when plaintiff has not

> tendered to perform her own obligations under the agreement. Further an order for specific performance would cause undue hardship on the defendant as its failure to complete construction is due to factors beyond its control (cement shortage) and is conditioned upon provision of material by the plaintiff which material is not forthcoming.
>
> With regard to the prayer for transfer, it is averred that such relief is being sought prematurely. Clause 2 (vii) of the agreement provides transfer of the property will be effected subject to full payment of the purchase price by the plaintiff and completion of the construction work by the defendant. None of the two conditions have been fulfilled."

The issues for trial were agreed at the pre-trial conference of the parties and they are;-

1. Whether the plaintiff paid the deposit and purchase price in full.

2. Whether the plaintiff has failed to pay the interest due on the purchase price.

3. Whether the plaintiff has an obligation in terms of the agreement between the parties to supply the fragile building materials listed in clause 2(viii) of the agreement.

4. Whether there is a shortage of cement and if so, whether such shortage constitutes a supervening impossibility.

5. Whether the plaintiff is entitled to the relief claimed.

Two witnesses testified at the trial on behalf of the plaintiff. The first to testify was Gloria Rondozai who represents the plaintiff by virtue of a power of attorney executed by the plaintiff in Portsmouth, United Kingdom. She is the one who signed the agreement of sale on behalf of the plaintiff on 3 November 2006.

In terms of clause 1(i) of that agreement the purchase price was Z$42 500 000-00 plus 15% VAT and this was for an 869 square metre stand and a 4 bedroomed house, specifications of which were set out therein. That clause further states:-

> "A DEPOSIT of nineteen million one hundred and fifty thousand dollars ($19 150 000-00) is inclusive of the purchase price for both the stand and the house chosen with the above description, Cash deposit must be fully paid within 48 hours of signing this Agreement of Sale, failure to which the Seller cancels the proposed sale without any further notice."

Clause 2 provides that the balance of the purchase price shall attract interest of 120% per annum and that the balance in question was due on 15 November 2006. It also empowers the seller to cancel the sale in the event of the purchaser's failure to pay instalments after giving the

latter 24 days notice to remedy the breach. That clause also requires the seller to complete construction of the house within 6 months from the date of purchase which is the date of receipt of the full deposit.

In terms of clause 2(viii);-

> "Should the purchaser manage to pay the whole purchase price of $42 500 000 (forty two million five hundred thousand dollars) latest by 15 November 2006, then the cost of building the above house shall only relevantly adjust to increase in price should any or all of the consumed or used fragile building material (s) increase in price by more than five percent (5%) so as to defray the resultant excess costs. These particularly being glazing, bathroom and toilet sets, all earthenware pipes together with the relevant accessories."

Clause 10 provides that should the purchaser fail to pay any sum of money due in terms of the agreement, the seller has the right to call upon the former in writing to comply within 30 days and if no compliance is done, to cancel the agreement. Clause 11 accords the purchaser the right to cancel the agreement in the event of the seller's failure to build the house after giving the seller notice to comply within 30 days.

Rondozai testified that the defendant insisted on the full deposit being paid before the signing of the agreement, which she did on behalf of the plaintiff, resulting in the agreement being signed at the offices of Fingold Real Estate, the agents selling the property on behalf of the defendant, on 3 November 2006. Elizabeth Chidavaenzi represented the defendant. She went on to say that subsequent to that, she paid the balance in instalments as she received the money from the plaintiff who is based in the United Kingdom, she having moved there in 2002.

Rondozai produced receipts (exhibits 2(a) 2(b) and 2(c)) showing that on 6 September 2006 $9 000 000 was paid to Fingold Real Estate, $1 000 000 on 16 October 2006; $1 000 000 on 19 October 2006 and $6 200 000 on 23 October 2006. This means that $17 200 000 had been paid towards the deposit of $19 150 000-00 at the time of signing the agreement on 3 November 2006, leaving a balance of $720 000 on the requisite deposit.

That balance on the deposit was only paid on 6 November 2006 when a sum of $10 800 000 was paid to Fingold Real Estate. This means that the balance of the deposit was paid a day late. The payment of the deposit left a balance of $23 350 000-00 on the purchase price and the exhibits show that sums of $640 000 and $12 096 000-00 were paid on 7 and 14 November 2006 respectively. Therefore by the due date of 15 November 2006, the plaintiff had paid a total of

$22 816 000-00 towards the balance of the purchase price leaving a balance of $534 000-00 on the purchase price.

Further sums of $1 400 000 and $3 2000 000 were paid on 22 February 2007 and 6 March 2007 respectively with the latter being receipted by the defendant and the former by one Leanah Tsatsa on behalf of the defendant. The receipts produced by the witness reveal that although the purchase price was not paid in full by 15 November 2006, it was paid by 22 February 2007 with an extra sum of $2 836 000, which according to the plaintiff's case was charged by the defendant as "interest component as well as a penalty for late payment."

The witness stated that most of the instalments were paid to Fingold Real Estate because they were the agents of the defendant through whom the plaintiff was purchasing the property and the agents insisted on the money being paid through them. She went on to say that the money was indeed forwarded to the defendant.

She stated that when she demanded that the defendant perform its part of the agreement by completing construction, the defendants' representative started complaining that they were not in a position to do that because the purchase price had not been paid properly, it having been paid to Fingold Real Estate who had deducted their commission before remitting payment to the defendant. The defendant was insisting that after payment of the deposit to Fingold, the plaintiff should have paid the balance directly to the defendant. Surprisingly the defendant had accepted the remittances from Fingold.

Rondozai went on to say that, when she last visited the property in September 2012, the house had been constructed but there were no window frames, burglar bars, durawall and sliding gate. The defendant had advised her that it had failed to finish the construction within the 6 month period provided for in the agreement because of a shortage of cement and that its builders had been contracted to South African firms to do construction work in preparation for the 2010 World Cup tournament which was to be hosted by that country.

The witness maintained that at no time did the defendant attempt to cancel the agreement and it never demanded from the plaintiff any other money except cash payments to enable the defendant to purchase fragile material, that is glazing, bathroom and toilet sets and earthenware pipes. She said the amount of $1 400 000 paid in cash to the defendant was for the purchase of

the fragile material as demanded by the defendant. The defendant was insisting these were not covered by the agreement.

Although payment was made, the defendant still did not complete construction of the house.

Under cross examination, this witness readily conceded that the full purchase price was not paid by the deadline of 15 November set in the agreement and that due to inflation, the delay in payment would disadvantage the defendant. She however stated that by agreeing to pay for the fragile material, over and above the purchase price paid, the plaintiff was compensating the defendant for the delay in payment. She explained that the defendant never demanded payment. She also conceded that VAT and the 10% endowment fee due to the municipality was not paid.

Gloria Rondozai gave her evidence well, she did not try to contort the facts and readily made concessions not favourable to the plaintiff's case. She struck me as a truthful and unsophisticated witness and I accept her evidence.

Violet Aleck Manda, the managing Director of Fingold Real Estate and a registered estate agent also gave evidence on behalf of the plaintiff. The thrust of her evidence is that her company was engaged by the defendant and acted as an agent in selling the property to the plaintiff.

The defendant insisted on the deposit of the purchase price being transferred into their account before signing the agreement. After deducting commission, Fingold then transferred it into the defendant's account. Once the defendant had satisfied itself that all was in order, its representative signed the sale agreement. At no time did the defendant complain about the deduction of commission by Fingold, neither did it query any remittances made to it by Fingold.

Manda explained that the sale agreement was generated by the defendant and it contained its standard conditions including the 48 hour clause dealing with payment of deposit (which instead was paid in advance of signing) and the instalments clause, when in fact there is a provision for a deadline of 15 November 2006 for payment of the purchase price. Fingold had to adapt it to the terms agreed by the parties. This explains why some of the provisions of the agreement were not enforced.

The witness explained that the defendant accepted all the payments Fingold forwarded to it without any query and never returned any payment so made. Her evidence was corroborative of most of what Gondozai said.

Only Elizabeth Chidavaenzi, the defendant's managing director, testified for the defendant. She stated that the defendant gave Fingold a mandate to identify a suitable buyer and sell the property. In return Fingold was to be paid a commission which is determined by the Estate Agents Institute, that is 5% of the purchase price. In that regard Fingold was given the defendant's banking details to deposit the money.

Chidavaenzi stated that in terms of the mandate given to Fingold, the latter was to receive only the deposit, deduct the 5% commission and remit the rest to the defendant. Once that was done, Fingold's mandate would cease and the balance of the purchase price was to be paid by the purchaser directly to the defendant.

When Fingold identified the plaintiff as purchaser of the property, problems arose after the deposit was paid in instalments over a period instead of it being paid within 48 hours of the signing of the agreement. Although the sale agreement still contained a clause providing for payment of deposit within 48 hours, the defendant validated the transaction even as the bulk of the deposit had been paid before the signing. She said she however insisted that further payments were to be made directly to the defendant.

This was not done as the plaintiff paid all but one of the instalments to Fingold. She confirmed that the plaintiff's representative notified her that Monica Mutodi of Fingold had instructed the plaintiff to continue paying through Fingold. Although she stated that this complicated issues, she did not stop Fingold from receiving payments on behalf of the plaintiff neither did she return payments forwarded by Fingold.

Chidavaenzi stated that hyper inflation was wreaking havoc in the economy at the time. The situation got so bad that everything came to a halt, workers stopped coming to work, shops were closing, fuel to run around doing business was in the black market and eventually industries closed including the giant cement supplier Lafarge which closed for a year. Under cross examination, she changed her story to say that Lafarge did not close, but was unable to supply cement for a year.

She stated further that when she noticed that the plaintiff had not paid the full extent of her liability by due date, she had telephoned Gloria Gondozai, who told her that the plaintiff had delayed sending money. She did not do anything but continued to receive late payments which should have been received on a "without a prejudice" basis. However this was not done, or endorsed on the receipts because payments were made to Fingold. Although it was the policy of the defendant to mark receipts for late payment "without prejudice" she did not explain why the receipt issued by the defendant on 6 March 2007 was not so marked.

Although the witness claimed that the defendant had written a letter to the plaintiff advising her that she was in breach of the agreement, she did not produce that letter. It is difficult to accept that such a letter was ever written. If it was, surely the defendant would have produced it.

The witness stated that the defendant constructed the house in terms of the agreement until they reached a stage, where they required the fragile material, that is; glazing, drain pipes, ceramic fittings, toilet fittings etc. These had not been purchased earlier because they easily break and it is the norm to require them when fitting is done.

She stated that they demanded payment for the purchase of the fragiles from the plaintiff who refused to pay insisting that the defendant supply and fit those fragiles and then claim compensation from the plaintiff. This affected the defendant as it was the responsibility of the plaintiff to pay for that material. As a result the defendant could not complete construction.

Chidavaenzi testified that the defendant did not take action to cancel the sale agreement because when they sent a letter to the plaintiff to purge her breach, all industries closed. No counter claim was made in this action because the defendant felt that the plaintiff would feel hard done by such course of action. They then elected to leave everything for the court to decide.

It is difficult to follow the logic of this testimony. If indeed the plaintiff was in breach, surely the defendant was at liberty to take action as provided for in the agreement. If truly the defendant has a counter claim, with the benefit of legal counsel it has enjoyed throughout, it would have made such counter claim. It did not.

Chidavaenzi estimated that the value of what the plaintiff paid for equates to only 30% of the cost of constructing the house. Under cross examination she stated that the value of what was done on the house before the plaintiff refused to pay for the fragiles was about US$60 000-00.

She later shifted ground to say it is only $15 000-00 and that a completed house is worth about $60 000.

She stated that although the money paid by the plaintiff was improperly paid, the defendant used it to pay its wages bill and several other expenses. She again later shifted ground saying that the defendant did not return the money to the plaintiff and did not do anything with it because there was nothing to buy on the market and eventually Zimbabwe dollar accounts were closed. This is very unreliable evidence.

The witness was unco-operative when asked what the defendant intended to do with the structure constructed using the plaintiff's funds. She could only say that she is a representative of a registered company and would await the resolution of the company and that she has no authority to disclose the intentions of the defendant.

Chidavaenzi did not make a good witness and her evidence is demonstrably unreliable in many respects. Most of it is not useful at all in the resolution of the dispute between the parties, as I have indicated above. Where her evidence is at variance with that of the plaintiff's witnesses, I prefer that of the latter.

The evidence led shows that the parties did indeed enter into a written agreement of sale in respect of the property whose provisions were generally not enforced by the parties and on the whole they allowed the agreement to exist on paper when they continued negotiating every step of the way. This explains why the plaintiff was allowed to pay exactly 4 instalments to Fingold which totaled $17 200 000-00 towards the deposit even before the agreement of sale was signed.

Those payments were made despite the fact that the sale agreement provided that the deposit was to be paid within 48 hours from the signing and not to Fingold but directly to the defendant. Those provisions were ignored.

Although the parties had adopted the approach which is not in the written agreement that the deposit was to be paid in full before signing the agreement, they still signed that agreement when a sum of $720 000-00 had not been paid. That amount was only paid in the instalment of 6 November 2006 in the sum of $10 800 000-00, a day after the expiration of the 48 hour period which existed on paper. It was still accepted.

While the written agreement provided that all payments including the deposit, were to be made directly to the defendant, all but 2 instalments were paid to Fingold which transmitted them to the defendant.

The defendant gladly accepted that payment method disregarding the provisions of the agreement.

The evidence also shows that the provision of the agreement requiring the balance of the purchase price to be paid by 15 November 2006 was wholly disregarded. By that date a sum of $534 000-00 remained unpaid and by her own admission Chidavaenzi took the trouble to contact the plaintiff's representative much later, demanding payment. Therefore, although she was aware of the outstanding money, she was willing to accept it outside the time frame set in the agreement without even invoking any of the provisions in the agreement relating to remedies available to the defendant for such delayed payment.

I therefore make a finding that the intention of the parties was to forge ahead with the payments due by the plaintiff and the construction of the house as long as the plaintiff was paying money for such construction, which she did. This explains why up to now the defendant has not cancelled the agreement or invoked any of the remedies available to it in the written agreement.

I now turn to resolve the issues placed before me for trial.

Whether the plaintiff paid the deposit and purchase price in full

The deposit for the property was agreed as $19 150 000-00. The evidence shows that a sum of $17 200 000 had been paid by 23 October 2006. When the plaintiff paid a further $10 800 000.00 on 6 November 2006, that accounted for the deposit in full.

It has also been established that by 14 November 2006, the plaintiff had paid, in 3 instalments, a total of $22 816 000-00 towards the balance of purchase price leaving a balance of $534 000-00 outstanding. A further sum of $4 600 000-00 was paid in instalments of $1 400 000-00 on 22 February 2007 and $3 200 000 on 6 March 2007. These payments obliterated the balance.

I therefore conclude that indeed the purchase price was paid in full.

Whether the plaintiff has failed to pay interest due on the purchase price.

Clause 2 (i) of the written agreement provides for interest of 120% per annum to be levied on the balance of the purchase price. There is nothing in the evidence led by the defendant to suggest that any computation of that interest was ever made or that after such computation it was demanded from the plaintiff. We are therefore left only with the testimony of Gloria Gondozai to the effect that the defendant caused her to pay on behalf of the plaintiff a sum of $3 200 000-00 towards interest and as a penalty for late payment.

That testimony was not challenged at all by the defendant and it was not even suggested that the said amount would not cover interest on the balance of the purchase price. It should be recalled that the balance of the purchase price was owing between 3 November 2006 and 15 November 2006. By 14 November 2006, which was only 11 day, a total of $23 536 000-00 had already been paid. Simple arithmetic suggests that even if nothing had been paid within those 11 days, the balance of the purchase price ($23 350 000-00) would have accrued interest of $84 443-84 by 15 November 2006. We know of course that the figure would be less because instalments were paid on 6 and 7 November 2006.

Between 15 November 2006 and 22 February 2007, the balance of the purchase price was $534 000-00 which in those 99 days would have accrued interest of $173 806-03. Therefore by simple arithmetic when the full purchase price was paid on 22 February 2007, it had accrued a total interest of $258 249-87, quite a small fraction of the $3 200 000-00 paid by the plaintiff which Gondozai says was for interest and penalty for late payment.

I am therefore of the firm view that interest on the balance of the purchase price was paid by the plaintiff. I accordingly answer the second question in the affirmative.

Whether the plaintiff has an obligation in terms of the agreement between the parties to supply the fragile building materials listed in clause 2 (viii) of the agreement

This issue presents some difficulty because not only is the evidence led clearly contradictory, it also is the issue which broke down the relationship between the parties.

In her replication, while insisting on enforcing clause 2 (viii) of the written sale agreement, the plaintiff concludes by saying:

> "The plaintiff is prepared to meet the excess costs when the defendant advises her of the quantum of the same."

Although Gondozai was a credible witness, her testimony regarding this issue is not clear. In her evidence in chief she stated that she had offered on behalf of the plaintiff to purchase the fragile building material to enable the defendant to complete construction but the defendant had refused insisting on being paid cash saying it was the only one able to purchase that material because it knew the material suitable for the area where the house is located. She later stated that the cash payment of $1 400 000-00, that she made directly to the defendant had been demanded by the latter for the purchase of the fragile material.

This suggests that the plaintiff acknowledged that the cost of the fragile material was never factored into the purchase price. In fact, under cross examination by counsel for the defendant, Gondozai affirmed that the plaintiff did agree to pay for that material separately. It is apparent that the plaintiff wanted the defendant to purchase and fit the fragile material and then claim compensation. This was not acceptable to the defendant which wanted payment upfront. This was made clear by Chidavaenzi in her evidence.

I have quoted clause 2 (viii) of the agreement above. Its wording is not helpful at all because not only is it long and winding it also lacks clarity. It however suggests that there was a general acceptance by the parties that the plaintiff would be required to pay more money for the fragile material.

In determining what the intent of the parties in this regard was, the court is not gifted with magical crystal balls but must find the answer from the conduct of the parties; *P G Industries (Zimbabwe) Ltd* v *Machawira* HH 255/12 at p 4. It must decide the state of mind of the parties as manifested by word or deed; *Levy* v *Banket Holdings (Pvt) Ltd* 1956 R & N 98(S) 104-5.

I have already made a finding that the parties may have had a written sale agreement but they did not pay much attention to it electing to negotiate their way through. It is in that light that clause 2(viii) must be viewed. However what comes out is that the parties intended that the plaintiff was to pay for the fragile material separately.

I have also found that Gondozai's testimony in that regard is not useful except to the extent that she recognised that the plaintiff would pay for the fragiles once the defendant had brought them on site. Once the plaintiff had taken that stance, it is unlikely that it would have paid $1400 000-00 towards the fragiles.

I conclude therefore that the plaintiff has an obligation to supply the fragile building material listed in clause 2(viii) and she still has to provide it.

Whether there is a shortage of cement and if so, whether such shortage constitutes a supervening impossibility

In my view, this issue has been overtaken by events. Although there may have been a shortage of cement in 2007, that problem no longer subsists and by its own admission; the defendant has long constructed the fence wall which would have required cement and installed a sliding gate.

Therefore nothing turns on this issue at this stage.

Whether the plaintiff is entitled to the relief claimed

Having concluded all the above issues, except for issue 3, in favour of the plaintiff, the inescapable conclusion is that the plaintiff is entitled to the relief that she seeks.

I have qualified the issue of fragile material because I am not persuaded that the plaintiff paid anything towards the provision of that material yet the evidence shows that it was intended by the parties that she would supply the material. It also shows that the only outstanding work on the house is the installation of fragile material. Upon supply of that material the defendant should be able to perform its obligation to finality.

The parties identified the fragile building material as glazing, bathroom and toilet sets, all earthenware pipes and relevant accessories. The plaintiff should deliver that material at the site for completion of construction work.

In the result I find in favour of the plaintiff who is clearly entitled to specific performance. In light of the plaintiff's lack of success on the issue of fragile building material she is only entitled to half of her legal costs.

Accordingly it is ordered, that

1. Upon delivery by the plaintiff of fragile building material namely glazing, bathroom and toilet sets, all earthenware pipes and relevant accessories, the defendant should complete construction of the house at stand 3187 of subdivision A of 159 Prospect, Harare
2. Such construction work should be completed within 30 days of delivery of the material set out in para 1 above.

3. Within 30 days from the date of completion of the construction of the house, the defendant shall sign all documents necessary to effect transfer of Stand 3187 of subdivision A of 159 Prospect, Harare to the plaintiff.
4. In the event of the defendant's failure to comply with para 3 above, the Deputy Sheriff for Harare is hereby authorised and directed to sign the said documents on behalf of the defendant.
5. The defendant shall bear 50% of the plaintiff's costs of suit.

Nyakutombwa Legal Counsel, plaintiff's legal practitioners
Mapondera & Company, defendant's legal practitioners