

JOHN SARACHI
versus
SUMAILI MARIZANI
and
MUNICIPALITY OF MARONDERA

HIGH CHOURT OF ZIMBABWE
ZHOU J
HARARE, 19 & 24 May & 6 & 16 & 20 June 2017 & 10 January 2019

Civil Trial

B. Pesanai for the plaintiff
Defendant in person

ZHOU J: The plaintiff's claim is for an order compelling the first defendant to sign all documents necessary for cession to the plaintiff of his rights, title and interest in an immovable property known as Stand 2528 Winston Park, Marondera and for vacant possession of the stand in question to be given to the plaintiff. Plaintiff also claims costs on the attorney-client scale. The claim is opposed by the first defendant. The second defendant is the local authority in whose jurisdiction the immovable property is located. It did not contest the relief which is being sought by the plaintiff and must by law be taken to have elected to abide by whatever decision will be made by this court.

The basis of the plaintiff's claim is that he purchased the rights, title and interest in the property from the first defendant in terms of an agreement which was concluded between the parties on or about 1 March 2014. The agreed purchase price according to the plaintiff was US\$25 000 which was payable by way of a deposit of US\$15 000 upon signing of the agreement and the balance by way of two monthly instalments of US\$5 000. The first instalment was due on or before 31 March 2014 while the last instalment was due on or before the last day of April 2014. The plaintiff's case is that he paid the full purchase price in terms of the agreement and was therefore entitled to vacant possession thereof and cession of rights, title and interest therein. On the other hand, first defendant's case as pleaded is that the plaintiff is not entitled to cession of the

rights, title and interest in and vacant possession of the property because he breached the agreement by failing to pay the full purchase price of US\$25 000. According to the first defendant's plea the plaintiff only paid a sum of US\$20 000 leaving a balance of US\$5 000 which he has failed to pay. The plaintiff in his replication states that the US\$5 000 was paid to the first defendant through his duly appointed agent.

Two issues were referred to trial, namely (a) Whether the plaintiff has legally performed all his obligations in terms of the agreement of sale, and (b) If so, whether the plaintiff is entitled to specific performance. At the pre-trial conference the first defendant made two admissions which were recorded in the joint pre-trial conference minute. These are (1) that the first defendant was paid US\$20 000.00 directly and that US\$5 000 was paid through Franklin Cote and Associates who handed it to first defendant; and (2) First defendant admitted that he gave Franklin Cote and Associates a power of attorney to act on his behalf in the matter. A third issue which is recorded under admissions made is, in fact, not an admission at all. It is a statement by the first defendant "that he wants to refund the plaintiff his \$25 000.00 in instalments because same was not paid in time".

The plaintiff gave evidence as the only witness in support of his case. His evidence was that he entered into a written agreement of sale, Exh 1, with the first defendant for the purchase of the immovable property described therein. He paid the deposit of US\$15 000 in terms of the agreement. He also paid the first instalment of US\$5 000 as agreed. Before he paid the final instalment of US\$5 000 he established from the local authority that the size of the stand was 4 020 square metres and not 5 000 square metres as represented by the first defendant in the agreement of sale. He arranged to meet the first defendant at the offices of the lawyers who prepared the written agreement to discuss the issue of the overstatement of the size of the property. He had the US\$5 000 in respect of the balance in his possession. When they met the first defendant advised him to keep the \$5 000 while he went to the second respondent's Council Offices to seek clarification on the issue. The next communication he got from the first defendant was in the form of court papers being served upon him by the Messenger of Court. The papers were for a court application instituted by the first defendant at the Magistrates Court at Marondera seeking cancellation of the agreement of sale. The plaintiff stated that the defendant claimed in the application that the plaintiff had failed to pay the balance of US\$5 000 in terms of the agreement.

The first defendant did not personally attend at the Magistrates Court on the date of the hearing but was represented by one Ennocent Maposa of Franklin Cote & Associates. An order by consent was granted by consent for the plaintiff to pay a sum of \$5 000 by close of business on 8 July 2014 and for the first defendant who was the applicant to pay the costs of suit on the attorney-client scale. The plaintiff duly paid that amount and was issued with a receipt by Franklin Cote & Associates. Ennocent Maposa exhibited a power of attorney, produced *in casu* as Exh 4, in terms of which he was authorized by the first defendant to represent him. After the payment had been made the first defendant wrote to the plaintiff a letter, Exh 5, which was delivered by courier stating that the plaintiff had breached the agreement in that he had made payment of the purchase price out of time. The letter was written on 29 August 2014 after the summons in the instant case had been issued. In that letter the first defendant acknowledged receipt of the \$5 000.

The defendant gave evidence himself and called three other witnesses to testify in support of his case. His evidence was that he sold the immovable property in dispute to the plaintiff because he had been offered a better immovable property and wanted the money to pay the purchase price for it. He stated that the plaintiff took time even to raise the deposit which he was required to pay in terms of the agreement. When it came to the payment of the last instalment the plaintiff advised the first defendant that he had learnt that the property was 4 000 square metres and not 5 000 square metres as stated in the agreement and for that reason he would not pay the \$5 000. The first defendant stated that after that communication he waited for ten days and wrote a letter giving the plaintiff seven days' notice to remedy the breach in terms of clause 7.2 of the agreement of sale. A copy of the letter which the plaintiff denied ever receiving was produced in evidence, Exh 8. The letter is dated 10 May 2014. When the plaintiff failed to remedy the breach he wrote another letter dated 20 May 2014, Exh 9, cancelling the sale. He denied engaging Ennocent Maposa, whom he referred to as a fraudster, to represent him at court or collect money from the plaintiff. He was not aware of the order that had been obtained at the Magistrates Court at Marondera. During cross-examination the first defendant suggested that there was no proof that he had received the balance of \$5 000 from Maposa.

First defendant's second witness was Wilmore Nyasha Ziyanga. His evidence was that he had worked together with Ennocent Maposa. He in the company of Maposa met the first defendant at Ruzawi Service Station in Marondera sometime in August 2014. On that day Maposa

summoned the first defendant and indicated that he wanted to give him advice, which the first defendant rejected. The witness also told the court that the first defendant told Maposa that he had received information that Maposa had been given \$1 000 by the plaintiff and that he, the first defendant was not prepared to accept it and was prepared to accompany Maposa to the plaintiff to return the money. He had no personal knowledge of the dealings between the first defendant and Maposa other than what he witnessed on that one day.

The third witness for the first defendant was Juliana Simon who used to work as a petrol attendant at the service station referred to earlier on as Ruzawi Service Station. He had seen Ennocent Maposa there before when he had an altercation with another lady which is unconnected to the present matter. On the second occasion he witnessed the interaction between Maposa and the first defendant during which Maposa offered to give the first defendant advice. He also witnessed discussion concerning a sum of \$1 000 which had been paid to Maposa by the plaintiff and which the first defendant was refusing to accept.

The last witness for the first defendant was George Kazika. His evidence was that sometime in August 2014 he was given a lift by the first defendant in the latter's motor vehicle. When they got to Ruzawi Service Station in Marondera they met Ennocent Maposa who approached the first defendant and offered to give him some advice. The defendant refused to take the advice. Maposa also told the first defendant that he had received \$1 000. The first defendant advised that he was not accepting that money and was prepared to assist in writing a covering letter for the money to be returned to the plaintiff.

From the evidence made the following facts are common cause. The plaintiff and first defendant entered into an agreement of sale in respect of the immovable property described above. The agreed purchase price was \$25 000 which was payable in instalments as detailed in the written agreement. All of it was paid. The dispute is on the last instalment of \$5 000 which it is common cause was paid to Franklin Cote & Associates. The joint pre-trial conference minute records admissions which were made by the first defendant. The second defendant admits therein that Franklin Cote and Associates were his agents having been given a power of attorney to act on his behalf. The suggestion by the first defendant that he had not authorized Franklin Cote and Associates to collect the money on his behalf is clearly false. This conclusion is further suggested by the fact that the defendant even went on to receive the \$5 000 from Ennocent Maposa. In his

letter dated 29 August 2014, Exh 10, which was written after summons had been issued, defendant does not state that Maposa had no authority to represent him or to receive money on his behalf. His complaint is that the money was paid after the alleged breach. He even offers to return the money. If Maposa had no authority to represent him the first defendant would simply have refused to receive the money from Maposa in the first place. A letter written by Laita & Partners legal practitioners challenging the joint pre-trial conference minute is of no consequence as it has no weight given that the author thereof is unknown and was not called to testify. The joint pre-trial minute is signed on behalf of the first defendant.

The sum of \$5 000 was paid in terms of an order of the Magistrates Court, Exh 2, which the first defendant has not challenged. It is an order by consent. In any event, the agreement of sale was never properly cancelled. It is an instalment sale of land. The Contractual Penalties Act [*Chapter 8:04*] in s 8 (2) requires that a notice of breach of such a contract be given in writing calling upon the purchaser to remedy the breach. The prescribed period for such a notice must be at least thirty days. *In casu* the letter dated 10 May 2014 (Exh 8), which the plaintiff denies having received, gave notice of seven days. The purported cancellation came some ten days later through the letter of 20 May 2014 (Exh 9), which the plaintiff also denies ever receiving. The purported cancellation is therefore a nullity for being in contravention of the provisions s 8 of the Contractual Penalties Act, see *Preston v Charuma Blasting & Earthmoving Services (Pvt) Ltd & Anor* 1999 (2) ZLR 201(S). In view of the invalidity of the cancellation of the agreement of sale it is not necessary for the court to inquire into the factual issue of whether or not these two letters, Exh 8 and 9, were ever delivered to the plaintiff. In any event, the totality of the evidence and probabilities in this case show that the first defendant did not deliver those two letters for the following reasons. The copies produced are signed, which would make them the original copies. There is also no reference to these two letters in any correspondence or communication from the first defendant. They were not discovered. The two letters were not even exhibited to the plaintiff when he gave evidence, which shows that they were probably prepared after the plaintiff had already testified as an afterthought. Most significantly, on 29 August 2014 the first defendant wrote a letter to the plaintiff, Exh 10, in terms of which he was terminating the agreement of sale based on the same alleged breach. If indeed the agreement had already been cancelled in May 2014 there would have been no reason for the first defendant to write Exh 10. He could have simply referred to the letter

of 20 May 2014. Clearly, therefore, the agreement was never cancelled. The \$5 000 was properly paid to and accepted by the first defendant. The court noted that notwithstanding the clear acknowledgment of receipt of the \$5 000 which is evident in Exh 10, the first defendant sought to suggest that he had not received it. He was not being truthful on that aspect.

The conclusion of this court in respect of the first issue is that the agreement of sale had not been terminated when the plaintiff paid the balance of \$5 000 to the first defendant. The plaintiff has therefore discharged his obligations in terms of the contract.

The second and final issue for determination is whether the plaintiff is entitled to specific performance. Specific performance is the discharge of that obligation on which the contractants agreed, hence it is regarded as the primary remedy which is aimed at the fulfilment of the contract, see van der Merwe *et al*, *Contract: General Principles 4th Ed.* p 328. The position of the law is that a party to a contract who has performed or is prepared to perform his obligations thereunder is entitled to an order for specific performance against the other party unless there are compelling reasons to the contrary, see *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21(H) at 25C-H, and the cases cited therein. The law thus recognizes that there may be circumstances in which an order for specific performance may be inapposite hence a discretion is reposed in the court as to whether or not to grant specific performance, *Farmers' Co-operative Society v Berry* 1912 AD 343 at 350; *Crundal Brothers (Pvt) Ltd v Lazarus NO & Anor* 1991 (2) ZLR 125(SC) at 132F; *Haynes v King William's Town Municipality* 1951 (2) SA 371(A). The discretion, like in all other cases in which the court has a discretion, must be exercised judicially upon a consideration of all the relevant facts and circumstances of the case, see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776(A) at 782H-I; *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd*, *supra*, p. 26A-30B on the factors relative to the exercise of the discretion. The onus is on the party against whom the decree of specific performance is sought to plead and prove on a balance of probability the circumstances upon which the court is being invited to exercise its discretion against the grant of the order for specific performance, such as the impossibility of performance or the insolvency of the debtor or that the order would bring about an unjust result or would be against public policy, see *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398(A) at 443; *Pretoria East Builders CC v Basson* 2004 (6) SA 15(SCA) at 21;

Benson v SA Mutual Life Assurance Society, supra, at 783, *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd, supra*, p. 29E-G.

The first defendant did not plead any special ground upon which the court should exercise its discretion against the grant of specific performance. It was only in cross-examination of the plaintiff and during his evidence-in-chief that he stated that he had offered to sell the property to the plaintiff at a price less than its market value because some other person had offered him a better immovable property which he intended to purchase using the proceeds of the sale of his property. Apart from the fact that this was not pleaded, no evidence was led to substantiate the assertion. The written memorandum of agreement of sale which explicitly stated that it contained the whole agreement between the parties never made reference to the first defendant's intention to appropriate the proceeds of the sale towards the purchase of another property. The defendant has received the full purchase price for the property which he is unable to refund other than through instalments. He did not even state the proposed instalments which shows that it is not a matter in respect of which the proposal is being made seriously.

The plaintiff has asked for attorney-client costs. The special order of costs is justified by the unreasonable conduct of the first defendant in persisting to defend the claim while he keeps the purchase price. The first defendant's opposition is based on inconsistent positions. In one instance he disowns Ennocent Maposa yet in the Joint Pre-trial Conference Minute he accepts that Maposa was his duly appointed agent. He even sought to challenge the power of attorney in the face of his explicit admission as recorded in the joint Pre-trial Conference Minute.

In all the circumstances of this case, the plaintiff is entitled to the relief being sought.

In the result, IT IS ORDERED THAT:

1. The first defendant signs all documents necessary to effect cession to the plaintiff of the rights, title and interest in Stand 2528 Winston Park, Marondera within seven days of this order being granted failing which the Sheriff be and is hereby ordered to sign any such documents as are necessary to give effect to this order.
2. The first defendant shall give vacant possession of the property referred to in paragraph 1 hereof to the plaintiff within seven days after the rights, title and interest in the property have been registered in the name of the plaintiff failing which the Sheriff or his lawful Deputy be and is hereby authorized to take all steps necessary to give such vacant

possession to the plaintiff, including ejectment of the first defendant and all persons claiming occupation through him from the property.

3. The first defendant shall pay the costs of suit on the attorney-client scale.

IEG Musimbe & Partners, plaintiff's legal practitioners