

PROFESSOR DAVID JAMBGWA SIMBI
versus
AROSUME PROPERTY DEVELOPMENT (PVT) LTD
and
DOCTOR MANSON MNABA
and
REGISTRAR OF DEEDS

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16 January 2020 & 4 March 2020

CIVIL-PRE-TRIAL CONFERENCE

S Mushonga, for plaintiff
F Nyangani, for 1st and 2nd defendants
No appearance, for 3rd defendant

TAGU J: On the 11th of January 2018 the plaintiff issued summons against the defendants jointly and severally the one paying the other to be absolved for an order-

1. That the 1st and 2nd defendants be and are hereby bound by the written agreement of sale of share 30 and share 31 of Stand 50 Carrick Creagh Township of Carrick Creagh of Section 4 of Borrowdale Estates measuring 5 6762 Hectares held under Deed of Transfer number 2985/2008 herein called the property as varied in October 2015.
- That the 1st and 2nd defendants be and are hereby ordered to pass Sectional title of share 30 and share 31 of the property to the plaintiff through 3rd defendant the Registrar of Deeds who is ordered to accept papers signed by the Sheriff to pass Sectional title for share 30 and share 31 of the property to plaintiff at plaintiff's sole expense in registering the sectional title into his own name.
- That the 1st and 2nd defendants hand over the share 30 and share 31 of the property to plaintiff to complete construction at his sole expense upon being handed architectural designs and building plans as they are within thirty (30) days from the date of service of this court order upon 1st and 2nd defendants. The 1st and 2nd defendants are to forego the purchase price of Stand 31 which will cover outstanding works.

- In the event of the 1st and 2nd defendants opposing this order they be made to pay plaintiff's costs at attorney and client scale otherwise the costs be on ordinary scale.
- 2. ALTERNATIVELY, in the event of the 1st and 2nd defendants objecting to the above order they be ordered to refund the plaintiff in terms of paragraph 6.1, 6.2 and 6.3 of the declaration together with damages aforesaid therein and costs of suit at attorney and client scale.

The facts of the matter as contained in the plaintiff's declaration can be summarized as follows. On the 31st of October 2017 the plaintiff and 1st defendant who was represented by 2nd defendant its alter ego and Managing Director entered into an agreement of sale of land and construction of two story house. The total cost of the two shares was \$70 000.00. In terms of the written lease agreement the construction of the two story building was supposed to be completed within six months from the date of payment followed by occupation by the purchaser. US\$ 130 000.00 was supposed to cover the full construction, costs, together with architectural designs, supervision and materials in in terms of the written agreement of sale. The plaintiff paid US\$130 000.00 to the 1st defendant in terms of the written agreement of sale and as a result got share 30 discounted for the cash purchase made by the plaintiff which meant that plaintiff had fulfilled his side of the written agreement of sale for share 30 and share 31 was to be paid for on handover being \$35 000.00 which plaintiff undertook to do upon completion and handover. In breach of the written agreement of sale and construction of the two story building the 1st and 2nd defendants failed to complete the construction of the agreed building in terms of the time period agreed upon by the parties in the written agreement of sale and construction. In October 2015 the parties varied verbally the terms of the written agreement by extending for another six months the completion of construction of the two story building on share 30 by 1st and 2nd defendants. The plaintiff now claims the orders stated above under paragraph 1 to the summons. Alternatively, the plaintiff claimed that the 1st and 2nd defendants refund the plaintiff the US\$130 000.00 paid to the 1st and 2nd defendants together with interest calculated from date of payment to date of full repayment as stated in paragraph 2 to the summons.

To put the alternative claim to the summons and declaration clearly the plaintiff said-

“Alternatively in the event of the 1st and 2nd defendant objecting to the above order (**that is under paragraph 1 to the summons**)(my own emphasis) they be ordered to refund the **plaintiff US\$130**

000.00 in terms of paragraph 6.1 and 6.3 of the declaration together with damages aforesaid therein and costs of suit at attorney and client scale.”

It is pertinent to state that at the time the summons were issued the Double Story building was at or just above the box level.

The defendants entered appearance to defend the claims and requested for further particulars to enable them to plead which were duly furnished. They then filed their plea on the 23rd of February 2018. The plaintiff also requested for further particulars from the defendants to enable him to reply. The defendants’ further particulars were filed on the 16th April 2018. Thereafter, pleadings were closed and the file was referred to me for Pre-trial Conference set for the 26th of November 2019. The parties had reached more or less a settlement on the way forward and a deed of settlement was to be crafted. On the 26th November 2019 the parties attended in my chambers only for the plaintiff to learn that the defendants had filed that morning with the Registrar of the High Court a CONSENT TO JUDGMENT in respect of the alternative fall back claim and that the defendant had actually deposited the RTGS\$130 000.00 into the bank account of the plaintiff’s lawyers.

However, the defendants had delayed to sign the Deed of Settlement and the matter came back to me for Pre-Trial Conference hearing before the Deed of Settlement was signed. At the date of hearing of the Pre-trial Conference the Double story building had already been roofed save for a few finishing touches.

The Pre-trial Conference failed to resolve the dispute as the parties differed on the way forward. Basically what happened during the Pre-Trial Conference hearing was that Mr. S. *Mushonga* refused to accept the consent to judgment in respect of the alternative claim on the basis that the consent to judgment was filed, and the deposit made without alerting them, and without agreement or consent of the plaintiff’s lawyers. Mr. S. *Mushonga*’s argument was that his client was now insisting that since he had paid in full in terms of the written contract and his house was constructed he wanted specific performance as opposed to the payment of the damages stipulated in the alternative claim. He went further to say that they had written to their Bankers to return the money to whoever deposited it.

On the other hand *F. Nyangani*, counsel for the respondents argued that the Consent to judgment pursuant to an alternative claim made by the plaintiff was accepted by the Registrar as

regular and the pleading entitles the plaintiff to apply for judgment in terms of the said consent. He further submitted that the consent to judgment effectively brings the matter to finality and the only issue which remains is the enforcement of the judgment.

In response Mr. *S. Mushonga* submitted that the law specifies that a party in breach of contract does not have the option of purging his default by paying damages but the injured party may elect to demand specific performance subject to the discretion of the court. Mr. *S. Mushonga* then suggested to file heads of arguments on the issue. The heads were duly filed by both parties. In his heads of argument Mr. *S. Mushonga* cited several case authorities to the effect that a defendant cannot purge his default by opting to pay damages instead of specific performance. Among several cases he cited *Farmers' Co-operative Society (Reg) v Berry* 1912 AD 343 at 340; *Woods v Walters* 1921 AD 303 at 309; *Minister of Natural Resources v FC Hume (Pvt) Ltd* 1989 (3) ZLR 55 (SC).

He concluded by saying the reason why the plaintiff herein claimed an alternative to specific performance in summons is the procedure to make a claim in the alternative. See *Woods v Walters* supra. According to him it is settled law that a claim for specific performance and alternative for damages for mora may be claimed in the same cause of action as the plaintiff herein did. See *Bray & Edwards v Rhodesia Consolidated Ltd* 1911 SR 60 and *Rhodesia Cold Storage and Trading Cao. Ltd v Liquidator Beira Cold Storage Ltd* (1905) 2 Buch AC 253 at page 267. He therefore said the plaintiff tendered back the RTGS \$130 000.00 because he prefers "SPECIFIC PERFORMANCE" which is his initial claim since the RTGS\$130 000.00 is not in conformity with the alternative claim in the summons hence plaintiff has refused it.

On the other hand Mr. *F Nyangani* submitted in his heads that in terms of Order 8 Rule 54 of the High Court Rules "A consent to judgment shall be in writing and be signed by the Defendant personally or by a legal practitioner who has entered appearance on his behalf..." he went further to submit that the authors Herbstein and Van Winsen in their book *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, fifth edition, details the procedure which follows a consent to judgment as follows "The confession must be signed by the defendant personally and the signature must either witnessed by an attorney acting for the defendant, not being the attorney acting for the plaintiff, or verified by affidavit, and furnished to the plaintiff,

whereupon the plaintiff may apply in writing through the registrar to a judge for judgment according to the confession”.

In casu, Mr. Nyangani said the plaintiff has neither filed the necessary application to obtain judgment nor has it challenged the veracity of the 1st and 2nd defendants’ consent to judgment, which begs the question in terms of which Rule does the plaintiff insist on judgment for specific performance. Hence the procedure taken by the plaintiff is unsupported and nothing can be obtained from such an irregularity. It was his further contention that where a plaintiff makes a claim in the alternative McKeurtan in his book *Sale*, 4th edition states as follows-

“a claim for specific performance or in the alternative damages gives the seller an election which lasts until he is judicially compelled to exercise it one way or another. If the seller chooses to tender payment before judgment he must tender an amount based on the then of the item. See *Umlilwan v Beningfield* 1911 NPD 320, *Pavn v Lokwe* 1912 EDL 33.

In *Power Coach Express Private Limited v Martin Millers* HH-232/11 GOWORA J in expounding almost the same principle said-

“Where, however, the purchaser elects to claim damages in place of actual performance, his reimbursement depends upon the value of the thing he ought to have received calculated at the date when he ought to have received it, or when the seller declines definitely to deliver it. His election to release the seller from the obligation to deliver and to claim in lieu of what a sum of money, crystallizes the claim both in nature and amount at the date of the seller’s breach of contract, and subsequent variations in the value of the article are immaterial. See *Stephens v Liepner* 1938 WLD 30 at 34, *Sam Hackner &Co. v Saltzman* 1940 OPD 200 at 204.”

In short Mr Nyangani argued that from the above citations it is clear that where a plaintiff pleads in the alternative he essentially gives the defendant an option to choose to consent to either one of the claims. He therefore said the cases cited by the plaintiff in its heads are cases where the Court had made findings of breach on the part of the defendant. This is clearly distinguishable from the present case where no finding of breach has been made by the Court but the 1st and 2nd defendants opted to settle the matter before Pre-Trial Conference, which course the defend ants are well within their rights to take. However, he said the defendants maintain the stance that the plaintiff is the one in breach as by his own admission he has not paid anything towards the purchase price. Quoting clause 2.1 of the agreement the defendants said the purchase price of the property is US\$35 000.00 which the plaintiff has not paid. In conclusion he said on the papers it is clear the plaintiff is yet to fulfil its obligations as envisaged in the contract and that the plaintiff has adopted

an irregular procedure and no relief can be obtained from such an irregularity as long as there is a valid consent filed of record.

From what I stated above it is clear the parties have failed to agree on a settlement during the Pre-Trial Conference. The plaintiff wants the matter to be referred to trial and that he now wants specific performance only as opposed to the alternative claim for damages. On the other hand the defendants are saying there is nothing to refer to trial since the claim has been settled in that they exercised the right to pay damages as claimed by the plaintiff in the alternative to the summons.

What the court found is that indeed from the authorities cited by the plaintiff a party who is in default cannot opt to purge his or her default by opting to pay damages as opposed to specific performance. This position of the law is applicable in my view, where specific performance has been claimed in the summons only and the defendant has been found to be in default. But the issue is debatable whether the plaintiff is at law allowed to insist on specific performance where the plaintiff expressly gives the defendant an option to pay damages and went on to state the amount to be paid in his or her declaration without making an application to amend his summons. In the present case the defendants have not yet been declared by a court to have breached the terms of the contract. Further the defendants did not *mero motu* decide to pay damages instead of rendering specific performance. They were given that option by the plaintiff himself and went on to pay the amount stated in the summons and declaration.

I considered the authorities cited by both counsels. I also considered the decisions of other authorities I came across during my research on almost similar situations. However, it is necessary to state that this matter is still at Pre-Trial Conference stage and the court cannot make a definitive order that disposes of the matter. What the court can do, since the parties are not agreeing, is to refer the matter to trial. However, it is my view that most of the facts are common cause. For this reason the court can only suggest to the parties that this is an appropriate case that must be referred to trial as a Stated Case, the parties must therefore prepare a Statement of Agreed facts and the issues to be decided, one of them being whether or not the CONSENT TO JUDGMENT effectively brings the matter to finality or not, and whether or not the plaintiff is entitled to claim for specific performance in a situation where he had given the defendant an option to accept an alternative claim for damages.

IT IS ORDERED THAT

1. This matter be and is hereby referred to trial as a Stated Case.
2. The parties be and are hereby ordered to prepare a Statement of Agreed Facts within a period of two weeks from the date of service of this order upon them, and include among other things, as one of the issues the question of whether or not a consent to judgment effectively brings the matter to finality or not.
3. Whether or not the Plaintiff can insist on specific performance only where he has given the Defendant an option to pay damages.
4. Costs are in the cause.

Mushonga Miutsvairo and Associates, plaintiff's legal practitioners
Nyangani Law chambers, 1st and 2nd defendants' legal practitioners