EDWARD MARUME
and
ELLEN CHAMUNORWA
versus
TODD MURANGANWA

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 18 October 2006 and 25 April 2007

UNOPPOSED APPLICATION

Mr *Muchanyerei*, for the plaintiffs
Defendant in default.

MAKARAU JP: This matter came before me in motion court as an application for default judgment in terms of Rule 58 of the High Court Rules 1971.

The facts of the matter as set out in the plaintiffs' affidavit of evidence are as follows:

The plaintiffs are husband and wife. On 12 April 2005, they sold their rights title and interests in a certain piece of land in Budiriro Township in Harare. The agreement of sale was in writing. It was a specific term of the agreement that the full purchase price would be financed from the proceeds of a staff loan to be advanced to the defendant from his employer. It was also specifically agreed between the parties that the purchase price would be paid in full against the registration of a mortgage bond within 21 days of the signing of the agreement of sale.

On 13 July 2005, the 21 day period having long expired, the plaintiffs caused a letter to be sent to the defendant calling upon him to rectify the breach failing which the contract of sale would be considered cancelled. In the letter, the plaintiffs also reserved to themselves the right to claim damages for the breach. Unbeknown to the plaintiffs, the property had been transferred to the purchaser on 21 June, 2005, weeks before the letter of demand was sent.

Payment of the purchase price was only made on 2 August 2005 less certain deductions that were detailed in the letter from the conveyancers enclosing the cheque. The cheque was sent back with a letter alleging that the agreement of sale had been cancelled and a reversal of the transfer would be sought.

On 3 March 2006, the plaintiffs issued summons against the defendant, claiming the sum of $366 503 000-00, being damages for breach of contract. The summons was duly served personally on the defendant at his place of residence. The *dies induciae* limited in the summons expired without the defendant taking any steps to defend the claim. The plaintiffs then applied for judgment, arguing that due to inflation, the amount of the cheque sent to them had been eroded by about 75% . They further argued that the purchase price of the property was meant for an investment in a farming venture where the plaintiffs anticipated growing wheat for the 2005 season. Due to the delay in the payment of the funds, they missed their target and the tractor they intended to purchase had since increased in price. In support of their claim, the plaintiffs attached a valuation report showing the value of the property as at 28 January 2006, months after the purchase price was tendered to the plaintiffs and months after the purchase price was due in terms of the agreement of sale.

When the matter was called up before me as an unopposed application for default judgment, I raised a number of issues with the plaintiffs' legal practitioners and requested him to file heads of argument to address those issues. Heads were only brought to my attention on 29 March 2007, hence the delay in the handing down of the judgment.

Two issues have exercised my mind in this matter. Firstly, it is whether by allowing transfer of ownership in the property to pass to the defendant well aware of the breach, the plaintiffs can still claim damages based on the same breach. Secondly, it has been advanced on behalf of the plaintiffs and is indeed clear from the wording of the claim and the nature of the proof tendered in support of that claim,

that the plaintiffs are raising inflation and the devaluation of the local currency as the basis of their claim and of calculating the damages allegedly due to them. I shall deal with each in turn.

It is common cause that the plaintiffs sent a letter placing the defendant in *mora* on 13 July 2005. At the time, it is further common cause that the plaintiffs had passed transfer of the property sold to the defendant well knowing of the breach. Transfer of the property by the plaintiffs was performance of their side of the bargain under the agreement of sale. It matters not in my view that transfer was effected by the conveyancers as such conveyancers were acting on a power of attorney drawn in their favour by the plaintiffs. Such power of attorney was not revoked even after it became clear to the plaintiffs that the defendant had committed a breach of the terms of the contract of sale entitling them to cancel. Plaintiffs' legal practitioners did not refer me to any authority where the performance of the contract by the aggrieved party, well aware of the breach by the other, still entitled the aggrieved party to claim for damages based on the same breach. In my view, the conduct of the plaintiffs amounts to approbating and reprobating at the same time. By allowing transfer to go through in the circumstances of this matter, the plaintiffs arguably gave out to the defendant that they had condoned the delay in the payment of the purchase price.

While I am of the firm view that the plaintiffs cannot rely on the breach by the defendant to claim damages in the circumstances of this matter, it is not necessary that I resolve the matter on this basis.

As stated above, the plaintiffs are aggrieved that the purchase price for the property as agreed upon had been eroded by inflation by the time payment was received such that in August 2005 it could only purchase 25% of what it could have purchased in April 2005. In support of the amount of their claim, they attached a valuation report showing the amount the property would have fetched as at the date payment was finally tendered to them. In my view, two issues immediately arise from the argument advanced by the plaintiffs.

Firstly, whether inflation is a basis for calculating contractual damages and secondly, the time when damages for breach of contract are to be assesses.

The second issue is easy of determination. It is settled law that damages under contract are to be assesses as at the date performance was due and not as at the date of judgment.

In *casu*, the plaintiffs have sought to calculate their damages as at the date of the late payment by attaching a report showing the price that the property would have fetched at a date later than the date performance was due. They have thus approached the issue of quantifying their damages incorrectly. In my view, they ought to have assessed their damages as 21 days after the agreement was signed in April 2005. Thus, the valuation report showing the value of the property as at 2 August 2005 on its own is of no import and does not assist the court in assessing the damages due to them.

The plaintiffs have not addressed me adequately regarding the second issue. In my view, the issue involves a detailed discussion of "currency nominalism" and "revalorization" and the place of such concepts in Zimbabwean law. In *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833, it was held that currency nominalism underlies all aspects of South African law. Currency nominalism holds that a debt sounding in money has to be paid in terms of its nominal value, irrespective of any fluctuations in the purchasing power. Thus, where currency nominalism is upheld, inflation has no role to play. Where however, "revalorization" is upheld, the current purchasing power of the currency is established and the amount of the debt is increased to take into account this "appreciation". (See *Eden and Another v Pienaar* 2001 (1) SA 158 (W)).

Due to my limited research and in the absence of meaningful assistance from the plaintiffs, I have not been able to come across any Zimbabwean case where these concepts are discussed in detail for me to establish the position in Zimbabwean law. I merely flag the concepts for fuller argument in an appropriate case.

In *casu*, it is my view that the plaintiffs have not adequately shown how they are calculating the damages due to them if any and in doing so, how they have factored in inflation and what rate of inflation they have used and whether this is acceptable under our law. It is not enough in my view to show that had the defendant paid in time, the plaintiffs would have had amount equal to the value of the property as at the date of the late payment. That is not the correct measure of the rate of inflation and it does not answer the question whether the difference in the purchasing power of money, especially in this hyperinflationary environment, constitutes a basis for claiming damages under contract law. Further, it does not answer the question whether currency nominalism as it applies to the purchase price under a contract of sale, does not underlie the law of contractual damages in this jurisdiction. It is my view that the plaintiffs need to address these issues further and possibly lead more evidence in support of their claim.

On the basis of the foregoing, the plaintiffs' application for default judgment cannot succeed.

In the result, I make the following order:

1. Absolution from the instance is granted.

2. There shall be no order as to costs.

C Nhemwa & Associates, plaintiffs' legal practitioners.