MICHAEL MAPOSA
versus
CFX BANK (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
PATEL J

Civil Trial

HARARE, 19 to 26 October 2010 and 11 January 2011

T. Mpofu, for the plaintiff
A. Chinake, for the defendant

PATEL J: The plaintiff herein claims damages in the sum of US$50,000 representing the market value of a house that the defendant had sold to the plaintiff as well as a third party. The defendant pleads that the agreement relied upon by the plaintiff is not legally enforceable.

The issues for determination in this matter are as follows: whether the agreement between the parties is legally enforceable and has been breached by the defendant; if so, whether the defendant is liable to the plaintiff in contractual damages; and, if so, the quantum of such damages.

Evidence for the Plaintiff

Michael Maposa, the plaintiff, testified as follows. He was employed by the defendant as its Branch Manager in Zvishavane until he was retrenched in 2006. He first took occupation of the CFX house in March 2004. On the 7th of July 2006, he received a letter from CFX offering to sell him the house for ZW$7 billion. He accepted the offer within the stipulated period of 7 days and, after paying for the house on the 27th of July, he signed an agreement of sale with the defendant on the 28th of July. The defendant then instructed a conveyancer to effect transfer and a rates clearance certificate was duly issued by the Zvishavane Town Council. However, on the 18th and 24th of August 2006, the defendant and its

lawyers wrote two separate letters cancelling the agreement of sale on the ground that the property had already been sold to and paid for by the POSB before the plaintiff had accepted the offer to purchase.

The prior letter of offer from the defendant to the POSB, dated the 20th of June 2006, was signed by the same person who had signed his offer letter. Again, the agreement of sale between the POSB and the defendant, concluded on the 30th of June 2006, was signed by the defendant's Managing Director, as was the agreement of sale with the plaintiff.

The defendant then issued a cheque for ZW$8 million on the 25th of August 2006. The letter of the 24th of August 2006 from the defendant's lawyers, which was sent to his Harare address, stated that the cheque was attached to the letter. However, it was not so attached and he only received the cheque on the 30th of October 2006, when it was delivered at the Zvishavane house through a Swift Express transfer. He did not accept the cheque because it had lost its value.

On the 1st of November 2006, he applied to enforce transfer to himself in Case No. HC 6890/06. The application was dismissed because of the law governing double sales, but the Court noted that it was open to him to claim damages from the defendant. He now seeks contractual damages equivalent to the value of the property in Zvishavane (*i.e.* US$50,000) based on two valuations obtained in March and October 2010.

Under cross-examination, the plaintiff accepted that he did not submit the details of his bank account as requested by the defendant in its letter of the 18th of August. This was because the letter was sent to the Zvishavane house and he only received it on the 30th of August. He also accepted that he received the letter of the 24th of August from the defendant's lawyers served through the Deputy Sheriff on the 28th of August. However, he did not pursue the non-enclosure of the defendant's cheque either with its lawyers or

the Deputy Sheriff. Moreover, his lawyers wrote to the defendant's lawyers on the 30th of August rejecting the refund, but not making any mention of the cheque not having been attached. He then explained that the cheque was returned in the first week of November 2006, but was unable to produce the covering letter accompanying the cheque. He conceded that if the refund together with interest as reflected on the cheque had been timeously paid, the defendant would have discharged its obligation under the agreement of sale. He also conceded that he kept full possession and control of the house in question from March 2004 to January 2010 and that neither the defendant nor the POSB have been able to utilise it during that period. Lastly, when he was shown a third valuation for US$40,000 that he himself had obtained in July 2010, he was unable to explain the disparity between that amount and the sum of US$50,000 that he was now claiming.

Evidence for the Defendant

Patricial Tsitsi Ndoro joined the defendant in 1999 and has been its Company Secretary and Legal Adviser since 2006. She was previously a magistrate for 9 years. In June 2006, the defendant sold its Zvishavane branch to the POSB together with the house. After discovering the double sale, she promptly wrote to the plaintiff on the 18th of August cancelling the sale to the plaintiff. She further indicated that there was no option but to refund the purchase price with interest, in terms of clause 9(d) of the agreement of sale. She also referred the matter to the defendant's lawyers and computed the amount of the refund with interest at the best prevailing CFX investment rate. A cheque for ZW$8 million (revalued) was then drawn and sent to the lawyers, who in turn wrote to the plaintiff on the 24th of August tendering that cheque. The letter was received by the Deputy Sheriff on the 28th of August and served on the plaintiff's gardener at his Harare address on the 29th of August. The refund was rejected by the plaintiff's lawyers in their letter of the 30th of

August, but without any mention of the cheque. The original cheque was never returned to the defendant.

The plaintiff has his own residence in Harare but did not surrender the Zvishavane house until the beginning of 2010. The defendant paid out ZW$167,000 (revalued) in September 2006 to the POSB for lodge expenses incurred by the latter in respect of its Branch Manager in Zvishavane. A letter from the plaintiff's lawyers to the POSB in March 2007 shows that the plaintiff's relative was staying at the house at that time. According to this witness, the value of the refund with interest (exceeding 100% per annum) that was tendered to the plaintiff equated to the sum paid by the defendant to purchase the property.

Under cross-examination, she accepted that the double sale *in casu* was entirely the defendant's fault and that it exposed itself to a claim for damages. She also accepted that the plaintiff himself did not demand any refund. However, the defendant decided that the best remedy was to tender a refund with interest as specific performance was not possible. The plaintiff was adamant on enforcement and did not give any alternative for settling the matter.

As regards the Swift Express transfer note, this was originally dated the 25th of August 2006. On the face of it, the defendant's lawyers sent one parcel, comprising inter-company documents, to the plaintiff at the house in Zvishavane, and this was received on the 30th of October 2006. The witness could not say what was contained in the parcel or why its delivery took over two months. At that time, the plaintiff had two claims against the defendant, one for the house and the other in respect of a motor vehicle. The latter was commenced before the former and the defendant had engaged the same law firm to deal with both claims. It was possible that the Swift Express transfer note related to the plaintiff's motor vehicle claim.

Findings

The defendant sold the property in question to the POSB in June 2006 and duly received payment of the purchase price. In July 2006, the same property was erroneously offered and sold to the plaintiff. He paid ZW$7 billion for it and signed the agreement of sale in the same month. The error in concluding the double sale was grossly unreasonable and entirely attributable to the defendant.

As soon as the error was discovered, in August 2006, the defendant wrote to the plaintiff, cancelling the agreement of sale and offering a refund of the purchase price with interest. The plaintiff immediately rejected the refund and applied for specific performance in November 2006 under Case No. HC 6890/06. That application was dismissed in September 2008 and the plaintiff then instituted the present action in March 2010.

The above facts are common cause and do not warrant any further analysis. What is fundamentally in dispute is the actual date when the plaintiff received the refund. The defendant asserts that the refund cheque was attached to their lawyers' letter of the 24th of August and was served through the Deputy Sheriff on the plaintiff at his Harare address on the 29th of August. The plaintiff admits having received the letter but denies that the cheque was attached to the letter. He maintains that the cheque was only delivered to him at the Zvishavane house on the 30th of October by way of a Swift Express transfer.

The defendant's version bears two difficulties. The first is that the refund cheque is dated the 25th of August, but their lawyers' letter is dated the 24th of August. The second is that the Deputy Sheriff's return of service refers to a letter and does not expressly refer to any cheque. The first difficulty is explicable on the basis that the letter might have been prepared before the cheque was drawn or that the cheque was intentionally post-dated before it was handed to the lawyers. The second difficulty is also explicable if it is accepted that the return of service need not have specifically mentioned the cheque as it was attached to the letter and was to be

simultaneously delivered. It is hard to imagine that the defendant's lawyers should have falsified the contents of their letter and deliberately weakened their client's position by not attaching the cheque to the letter in circumstances where a prompt tender of the refund was essential.

On the other hand, the plaintiff's version is fraught with greater difficulties. These stem primarily from the contents of his lawyers' letter of the 30th of August, in response to the defendant's lawyers. The pertinent paragraph reads as follows:

> "We are also in possession of a letter from yourselves purportedly cancelling the sale. We have read the contents therein. We would like to advise that our client does not accept the refund and is not giving vacant possession to anyone and awaits any legal proceedings intended." (The emphasis is mine).

Firstly, it is extremely strange that the plaintiff's lawyers, having read the contents of the letter and its explicit indication of the cheque having been attached, should make no mention whatsoever of the fact that the cheque was not attached, if that indeed was the case. Secondly, the words underlined demonstrate that the refund, *i.e.* the cheque, had in fact been received but was not accepted by the plaintiff. As for the Swift transfer, there is no clear indication of what was contained in the parcel delivered to the plaintiff on the 30th of October. Having closely observed the plaintiff's testimony under cross-examination, I am inclined to disbelieve his contention that he only received the cheque on that day.

On balance, I am of the view that the probabilities favour the defendant's version of what transpired. I accordingly find that the plaintiff received the refund cheque on the 29th of August, *i.e.* 33 days after he paid the purchase price for the property, and not on the 30th of October.

Disposition

In light of the above findings of fact, the principal issues for determination are whether the refund that was tendered by the defendant was properly made and, if so, whether it was adequate in the circumstances of the case. In this regard, I am entirely in agreement with the position taken by Adv. *Mpofu*. In the case of a double sale, the innocent buyers have different remedies. One is entitled to demand specific performance, while the other is entitled to damages. It is trite that a plaintiff aggrieved by a breach of contract is entitled to claim such damages as will put him in the position that he would have been in had the contract been properly performed by the defendant. In my view, the submissions put forward by Mr. *Chinake* as to the distinction between contractual damages and delictual damages, and the sufficiency of the plaintiff's pleadings in that context, are somewhat tangential and not particularly germane to the resolution of the matter at hand.

It is not disputed that the defendant's error in selling the property twice within one month and through the same functionaries was absurdly unreasonable. Moreover, the refund cheque was tendered without the plaintiff's input as to the modality and quantum of payment. In effect, the defendant's conduct in this respect was unilateral and not consensual. The remedy prescribed in clause 9(d) of the agreement of sale, in the event of the seller's default, is contingent upon the purchaser making the requisite demand. In the instant case, the plaintiff did not any stage make any demand for a refund. On the other hand, looking at the matter from the defendant's perspective, upon becoming aware of its error, it knew that it was in breach of its contract with the plaintiff and that it had to take prompt remedial action. Specific performance having been rendered impossible, and given the spectre of rampant inflation, the only remaining option was to promptly compute and tender a refund that would adequately compensate the plaintiff. (In this respect, neither the plaintiff nor his counsel was able to proffer any meaningful alternative that might have been available to the

plaintiff). Consequently, despite the fact that the defendant's decision to refund the purchase price was taken unilaterally, it seems to me that it acted expeditiously and properly in the prevailing circumstances to rectify its own breach of contract.

Turning to the adequacy of the amount that was tendered by way of refund, it is common cause that the defendant relied upon clause 9(d) of the agreement of sale to calculate that amount. Applying the prevailing 91 day interest rate offered by the defendant, the amount tendered was a sum of ZW$7 million (revalued) together with interest amounting to ZW$1.1 million, making a total of ZW$8.1 million. As I have already noted, this refund was tendered 33 days after the plaintiff had paid the purchase price. Thus, the interest component equated to a rate of *circa* 14.2% per month or 170% per annum. Given the highly volatile nature of the money market at that time, it cannot be said that amount of ZW$8.1 million equated precisely in value to the purchase price paid 33 days before. Nevertheless, the interest element represented an unquestionably appreciable return on the sum originally paid by the plaintiff. In my assessment, the global amount tendered by the defendant would have constituted fair and reasonable (though not exact) compensation for the contractual damages suffered by the plaintiff.

At that stage, the plaintiff was fully aware that the property had been previously sold to and paid for by a third party and, being legally represented, ought to have been aware that in those circumstances a claim for specific performance would not succeed. Instead of accepting the refund, he elected not to do so and held on to the cheque (as is borne out by the fact that the cheque itself was listed in the plaintiff's schedule of discovered documents, filed on the 15th of June 2010) and later instituted an application for specific performance. In all the circumstances of the case, I take the view that the plaintiff ought to have accepted the refund at the time when it was tendered as adequate compensation in lieu of specific

performance or contractual damages. His failure to do so is exacerbated by the fact that he retained beneficial possession and control of the property for over 3 years thereafter, contrary to the rights and interests of the defendant and the prior purchaser.

In addition to the above conclusions, there is a further reason why the plaintiff's claim cannot succeed, which reason I shall deal with briefly. It concerns the quantum of damages claimed by the defendant, *i.e.* US$50,000, for which he relies upon the two valuations that he obtained in March and October 2010. However, there was a third valuation, obtained in July 2010, for a much lesser amount of US$40,000. The plaintiff was unable to justify this disparity which clearly undermines the validity of his claim for US$50,000. Again, if one were to consider the sum of money that the plaintiff originally paid for the property, no evidence was lead to show that the sum of ZW$7 billion equated to US$50,000 in July 2006, whether at the official exchange rate or at the prevailing parallel rates of exchange. Equally significantly, the valuations that were produced were all obtained in 2010. The plaintiff did not adduce any evidence to compare these 2010 market values to those obtaining at the time of the breach of contract in 2006, which is the time at which his claim for damages must be assessed. It cannot be accepted that the property *in casu* has retained the same value in the property market from 2006 to 2010. It should have been perfectly possible, as is undoubtedly possible for the purpose of determining liability to capital gains tax, to have obtained a valuation in US$ terms in respect of the property in 2006. The plaintiff's failure to do so is also fatal to his claim for damages.

In view of all of the foregoing, it seems quite unnecessary to delve into the broad question of currency nominalism raised by counsel in their submissions or the correctness of the decision rendered by this Court in *Kwindima* v *Mvundura* HH 25-2009. This is a matter that is peripheral to the issues in this case and, as such, it does not warrant any definitive determination for present purposes.

It follows that the present action must be dismissed. As for costs, although the defendant's Plea claims costs *de bonis propriis* against the plaintiff's legal practitioner of record, there is nothing in Mr. *Chinake's* closing submissions to justify such an award of costs. In the result, the plaintiff's claim is dismissed with costs on the ordinary scale.

Mutombeni, Mukwesha & Muzawazi, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners