PATRICIA MANDALA
versus
GLENS REMOVALS & STORAGE
ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
BERE J
HARARE, 17 October 2011 and 18 October 2012,
14 February 2013

Civil Trial

N P Goneso, for the plaintiff
H Nkomo, for the defendant

BERE J: On 18 October 2012, I pronounced my decision in this case. I indicated my reasons would follow. Here they are:

The plaintiff originally issued summons in this court on 24 October 2005 against the defendant seeking an order to compel the defendant to return her property which had been deposited with the defendant for safe keeping when the plaintiff left this country for the United Kingdom.

The plaintiff had also sought in the alternative to be paid the estimated equivalent value of the goods in question. Additionally the plaintiff sought to recover general damages for pain, emotional stress and trauma caused by the unlawful disposal of her property without her consent and knowledge.

The plaintiff's claims were originally pegged in the local currency.

Owing to the advent of dollarization, on 30 September 2010, and by consent the plaintiff's claim was amended to reflect the currency currently in use in this country.

The plaintiff's claim was amended in the alternative to read that in the event of the defendant failing to restore the plaintiff's property, the defendant be ordered to pay a sum of US$25 000-00 being damages suffered by the plaintiff when the defendant wrongfully and unlawfully sold the plaintiff's property.

The plaintiff's claim for damages for pain and suffering, emotional stress and trauma was put at US$3 000-00.

The interest at the prescribed rate on the total amounts of claims was claimed from the date of summons to date of full payment.

THE FACTS THAT ARE NOT IN DISPUTE

The facts giving rise to this action can be summarised as follows:

On 28 March 2000 the plaintiff lodged her household goods with the defendant for storage at agreed monthly charges. When the plaintiff lodged her goods with the defendant she personally gave her contact address as 48 A Manor Avenue, Brockley, London SE4 IPD. This is apparent from exh 1 (receipt for goods) signed by the plaintiff at the time the goods were taken into the defendant's storage. This is the only document which was signed by the plaintiff.

It is not in dispute that the plaintiff's stored goods were to attract a monthly storage charge and that payment in this regard was to be made in advance.

In addition, it was a specific term of the agreement between the plaintiff and the defendant that should the storage charges "remain unpaid for three (3) consecutive months, Glens reserves the right to sell part or all the goods by public auction without notice in order to defray the accrued charges."

It is the alleged violation of this clause of the contract that has led to these proceedings.

Following the alleged default by the plaintiff in the payment of storage charges the bulk of her property was sold through public auction. Some of the property which could not possibly have been sold like the plaintiff's marriage and educational certificates could not be accounted for. The same happened with other household goods which did not appear on the list of items sold by public auction. These were simply not traceable.

It is also common cause that after the defendant had taken what it believed was due to it, there was some residue due to the plaintiff and that it was not until the plaintiff had gone to the defendant to enquire about her goods that she was advised of both the sale and the residue.

The plaintiff's property was sold by public auction without her knowledge and in disposing of the property in the manner it did the defendant relied on the terms of the conditions of storage as perceived by it.

This matter was referred for trial on only one issue, namely: "Whether or not the defendant breached the contract between the plaintiff and the defendant or alternatively

whether or not the defendant acted wrongfully and unlawfully in the circumstances, if so the quantum of damages."

THE EVIDENCE

Only two witnesses gave evidence in this case, namely, the plaintiff and Mr Josephat Murape, the defendant's representative.

The parties were not in agreement on virtually all the issues they testified on and in particular as to the alleged arrears at the time of the sale of the plaintiff's property. The defendant through its representative put the figure for arrears at Z$1 152 850-35 but could not provide a satisfactory explanation as to how that figure was arrived at suggesting that because of hyperinflation at the time the originally agreed storage charges kept on being changed. The witness said all these changes were in correspondence sent to the plaintiff's locally chosen addresses.

The plaintiff's approach in this regard was to vehemently deny ever receiving any correspondence or notices from the defendant. The plaintiff put up a very strong and persuasive argument that in the only paper that she signed and lodged with the defendant before her departure for the United Kingdom she gave her contact address as the UK one. This averment accords with or is consistent with exh 1 which is the only document signed by the plaintiff.

When it was suggested to the plaintiff in cross-examination that the relevant notices to alert her of the arrear charges were either sent to number 34 Greg Avenue; Number 16 2nd Crescent Street, Warren Park Harare and to number 7 Delomo Place, Mt Pleasant, Harare, the plaintiff denied ever instructing the defendant to use any of such addresses and maintained that her contact address which the defendant was supposed to use as per her written instructions was 48 A Manor Avenue, Brockley, London SE4 IPO.

The plaintiff denied ever giving the defendant instructions to send any correspondence to any other place other than the aforesaid United Kingdom address. The plaintiff maintained she did not know anyone on the addresses allegedly used by the defendant. She further maintained that she did not know of a place called 7 Delomo Place, Mt Pleasant where some of the letters addressed to her were sent but that her place was called 7 Delano Place, Mt Pleasant (my emphasis), a factor which even the defendant's counsel was later to concede in his written submissions.

The evidence of Murape corroborated the plaintiff's evidence that none of the correspondence to the plaintiff was ever addressed to her chosen United Kingdom address as per her clear instructions on exh 1.

If the court accepts that the correspondences meant for the attention of the plaintiff were sent to the wrong addresses (which factor the court has no option but to accept) it must therefore be the natural conclusion that the plaintiff must be believed when she said she was never advised of the arrear payments and further that the defendants unilaterally decided to sell her property to allegedly defray the accrued charges which she was not aware of.

WAS IT COMPETENT FOR THE DEFENDANT TO SELL THE PLAINTIFF'S PROPERTY WITHOUT ANY RECOURSE TO COURT

The main thrust of the defendant's position is that the contract allegedly entered into by the plaintiff and the defendant allowed the latter to act in the manner it did.

In his closing submissions counsel for the defendant equated the contractual arrangement to one governed by what is referred to as a "*paratie* execution clause" which he argued has support in our law. Counsel referred me to the case of *Changa* v *Standard Finance Limited*[1] where there is some reference to this principal of our law.

There can be no argument in my view that "*paratie* execution" in appropriate circumstances remains part of our law subject to the qualification that the creditor is precluded to act in a manner that prejudices the debtor in his/her rights.

In this jurisdiction the operation of "*paratie excutie*" as a principle of our law can be traced back to the case of *Aitken* v *Miller*[2] per BEADLE J where the headnote reads:

> "In Southern Rhodesia an agreement for the sale by means of *paratie executie* of movables, delivered to a creditor by a debtor, is valid and enforceable[3]".

The qualification in the operation of *paratie excutie* is succinctly put in the following terms in *Osr* v *Hirsch*, Loubser and Co Ltd[4]:

> "It is, however, open to the debtor to seek the protection of the court if, upon any just ground he can show that, in carrying out the agreement and effecting a sale, the creditor has acted in a manner which has prejudiced him his rights."

[1] 190 (2) ZLR 412 (S)
[2] 1951 (1) SA 153 (SR)
[3] 1951 (1) SA 153 (SR) at p 153
[4] 1922 CPD 531 @ 547

It occurs to me that *paratie excutie*, as a principle of law is not something that our courts have blindly followed. I will later in this judgment deal with either its applicability or non-applicability in the instant case.

In contrast counsel for the plaintiff in this case put up an equally strong and persuasive argument that in her conviction the clause that governed the plaintiff and the defendant in this case, and relied upon by the defendant in disposing of the plaintiff's property was a "*pactum commissarium*" and unenforceable, and therefore invoking it in this case was incompetent on the part of the defendant.

In supporting her position the plaintiff's counsel referred me to the case of *Chimutanda Motor Spares* (*Pvt*) *Ltd* v *Teclar Musare & Anor*[5] where the leaned Judge, MUTAMBANENGWE (as he then was) made a fairly detailed analysis of a *pactum commissorium* and why the law reprobates it.

In the particular case he was seized with the learned judge remarked;

> "I find the agreement as to the consequences of defaulting on the defendant's part is a *pactum commissorium* and as such unenforceable.[6]

It would seem to me that in all the cases where an attempt has been made to rely on a *paratie executie*, both the defendant and the plaintiff would be in agreement as regards the liability of the latter. Liability is never an issue in those cases as there is unanimity in that regard.

In the case before me there is certainly no unanimity as regards the liability of the plaintiff. This issue occupied the bulk of the proceedings in this case and even after the case was concluded, it was not possible to establish the alleged liability of the plaintiff because of the position adopted by the plaintiff and accepted by the court that she was never advised of her liability through her chosen contact address.

It occurs to me that before the defendant sought to dispose of the plaintiff's property in the manner it did, the plaintiff's liability ought to have been established first through a court process. In this case there was no agreement as regards what was due to the defendant hence the inapplicability of the principle.

Even if one were to assume that *parate execution* was applicable in this case, it is clear to me that in unilaterally deciding that the plaintiff owed it certain sums of money in a

[5] HH 48-94
[6] P 6 of the cyclostyled judgment

situation where the defendant acted as both the prosecutor and the adjudicator in determining what was allegedly due to it, the defendant acted to the prejudice of the plaintiff. If this is accepted (as it should be, in my view), then, it becomes clear that the situation in this case projects the qualification highlighted in *Osr*y's case (*supra*) where the plaintiff has a justified reason to have recourse to court.

The plaintiff's position in this case is that she was never given the opportunity in court to contest what was allegedly due to the defendant in terms of outstanding payments before the defendant unilaterally decided on the figure which was followed by the sale of her property by way of public auction. There is persuasion in the argument advanced by the plaintiff's counsel that there was need for the plaintiff to get a court authorization/order to dispose of the plaintiff's property. Loosely interpreting the contract in the manner suggested by the defendant's counsel would in my view have grave consequences in that that approach would stampede upon the rules of natural justice which demand that even a murderer must be heard first before drastic or adverse action is taken against him/her.

Allowing the defendant to embark on unilateral action would give the defendant to act as both the prosecutor and a judge in a matter it has vested interest in and in my view this would not accord well with public policy. Consumers or those in the plaintiff's position would be most vulnerable to such conduct as exhibited by the defendant in this case. There is need to curtail of the conduct of the defendant by ensuring that it does not act to the prejudice of the consumers of its services.

It is equally disturbing that contrary to the averments by the defendant, the evidence in this case clearly showed that not all the property that was deposited with the defendant was sold through public auction. Property like the plaintiff's marriage certificate, children's academic and birth certificates could not possibly have been sold and such property was not accounted for. It was only in a fully-fledged adversarial proceedings which ought to have preceded the disposal of the plaintiff's goods that such issues should have been ascertained.

I find it even more disturbing that even after unilaterally selling the plaintiff's property, the defendant did not bother to trace the plaintiff at her chosen contact address to give her the residue from the sale of her property after taking into account what it deemed was due to it.

One gets the impression that if the plaintiff had not taken it upon herself to take the trouble of going to make enquiries to Glens (the defendant) she would never have known

what happened to her property. The conduct exhibited by the defendant falls far short of the best practice in conducting business in a transparent manner.

Everything said I am more inclined to accept, as persuasively argued by the plaintiff's counsel that the condition relied upon by the defendant in selling the plaintiff's property without the knowledge, consent and or approval of the plaintiff was a *pactum commissorium* one, which our law reprobates.

If this position is accepted (as it should be), then it logically follows that the defendant acted wrongfully and unlawfully in facilitating the disposal of the plaintiff's property in the manner it did.

REPLACEMENT OR COMPENSATION OF THE PLAINTIFF'S PROPERTY

Because of the distortions brought by dollarization it was never going to be easy for the plaintiff to try and give an accurate value of her property which was unlawfully sold by the defendant.

The plaintiff must however be commented for having taken the trouble of trying to find comparable prices or values of her property. The plaintiff visited some departmental shops like Meikles and Barbours collating possible replacement values of her property. In this regard the plaintiff produced two sets of quotations from Barbours and Meikles Departmental Sore whose total value adds up to US$28 454-00.

Throughout the proceedings, I did not hear the defendant making the slightest attempt to challenge the quotations or values given by the plaintiff. If anything the thrust of the defendant's representative was merely to say that his company was justified in selling the plaintiff's property in the manner it did, something which this court finds to have been wrongful, unlawful and distasteful.

The uncontested value of the plaintiff's property adds up to US$28 454-00 but in her summons she claimed US$25 000-00.

I am more inclined to grant to the plaintiff the figure in her summons as a fair estimation of her unlawfully sold property as opposed to the US$28 454-00 because there was no attempt by her counsel to have her claim amended to accord with her evidence at the close of the proceedings.

THE CLAIM FOR DAMAGES FOR PAIN AND SUFFERING

I have had the privilege of seeing the plaintiff testify in these proceedings.

That the plaintiff was pained by the loss of her property through the conduct of the defendant cannot be doubted by anyone. In her own uncontested testimony the plaintiff said she actually fainted at Glens when she was told that all her household property deposited with the defendants had been sold.

Even when she gave evidence in this court it was evident that she had been severely traumatised by the loss of her goods, the pain she was in was unmistakable and was there for everyone to see. This probably explains why the defendant's representative did not make any attempt to challenge her evidence in this regard.

In this regard I consider US$1 500-00 as fair and reasonable as general damages for the plaintiff's pain and suffering.

Consequently I order as follows:

(1) That judgment be and is hereby granted in favour of the plaintiff in the sum of US$25000-00 being the replacement value of her property wrongfully and unlawfully sold by the defendant without the plaintiff's knowledge and or authorization.
(2) That the defendant pays US$1 500-00 to the plaintiff for damages for pain and suffering occasioned by the unlawful conduct of the defendant.
(3) That both payments attract interest at the prescribed rate from the date of judgment (18 October 2012) to date of payment in full.
(4) That the defendant pays costs of suit.

Goneso & Associates, plaintiff's legal practitioners
Mtetwa & Nyambirai, defendant's legal practitioners