

PAUL KARANDA
versus
GLADYS SVOSVE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 3 October, 2, 3 November 7 & 14 December 2016

Civil Trial

Ms R Gasa & Ms E T Mazarura, for the plaintiff
CW Gumiro, for the defendant

CHAREWA J: The plaintiff issued summons against the defendant claiming a refund of \$5 840.00, and the return of 14 herd of cattle, alternatively their value in the amount of \$7 100.00, being payment towards the purchase price of Stand 1234 Northwood, Chivhu, interest at the prescribed rate and costs.

Facts

It is common cause that the parties entered into a sale agreement whereby defendant sold, and the plaintiff purchased the property known as Stand 1234 Northwood, Chivhu, for thirty thousand United States dollars (USD30 000.00). The agreement of sale, exh 1 at p 2 of the plaintiff's bundle of documents, provides that payment was to be made partly in cash and partly by delivery of ten head of cattle. The cattle were to be delivered on or before 18 March 2013, while the cash component was to be paid as \$10 600 on or before 30 April 2013 and \$15 000.00 on or before 30 April 2014.

It is further common cause that the plaintiff is a pastor in the Methodist Church, currently based in Chivhu. At the time the parties entered into an agreement of sale, the plaintiff was a pastor in Rusape and defendant was his congregant thereat.

There is no dispute that plaintiff failed to deliver the cattle by 18 March 2013, or to make payment of \$10 600.00 by 30 April 2013 in terms of the agreement. It was not contested that Plaintiff therefore wanted to cancel the agreement as a result of his failure to adhere to the agreement. However, the defendant decided to obtain the mediation of the

parties' Bishop to ensure that plaintiff discharged his obligations. As a result of such mediation efforts, the first of which was held in May 2013, it was not challenged by defendant that plaintiff undertook to make undetermined cash payments, as and when he could, into defendant's bank account. Consequently, he paid several sums totalling \$5 840.00 between 9 May 2013 and 2 September 2013. The deposit slips marked as exh 3 refer.

He also obtained a stock clearance certificate for fourteen herd of cattle on 15 May 2013 (exh 2). In her plea, the defendant acknowledges delivery of ten cattle as a consequence of exh 2 and the receipt of the monetary value for four more cattle, though in her testimony, she denied receiving the extra 4 cattle or their monetary value.

Subsequently, defendant cancelled the sale agreement in November 2013, and tendered a return of \$5 840.00 and ten herd of cattle. She also sold the property to a third party allegedly for \$22 500.00, \$7 500.00 less than the value of the property. She did not produce any valuation of the property or proof of receipt of \$22 500.00. Neither did she counterclaim for damages.

There is no dispute that the agreement was terminated. The question is whether such termination was lawful to allow defendant to retain the purchase price or prevent plaintiff from claiming a refund.

Issues

From the facts and evidence adduced, the issues for the Court's determination are as follows:

1. Whether the Contractual Penalties Act [*Chapter 8:04*] applies?
2. Whether or not the defendant's demand for and acceptance of cash payments and delivery of cattle after the due dates as provided for in the agreement of sale amounted to a waiver of her rights, including the right to payment terms contained in the agreement of sale?
3. Whether or not the agreement of sale was lawfully terminated?
4. Whether or not defendant was unjustly enriched?
5. Whether or not the plaintiff is entitled to a refund of the payments in cash and in kind towards the purchase price?

Parties' submissions

Plaintiff

The plaintiff gave evidence on his own behalf and also called Bishop Makiwa, whom defendant approached for mediation. The bishop substantially corroborated plaintiff's testimony. Even defendant's witness corroborated salient aspects of plaintiff's testimony.

Plaintiff was unequivocal that he was unable to adhere to the contract at all right from the outset and would have pursued cancellation but for defendant's insistence on seeking mediation to continue with the agreement contrary to advice from the Bishop. Such mediation resulted in the variation of the payment terms in that, he made payments way after the due dates, and was only obliged to pay as and when he could, and in whatever amount he could manage. He was therefore surprised when he received the letter, exh 4, allegedly confirming cancellation without giving any notice. He further testified that he had no problems with the cancellation if he was refunded his purchase price, particularly since the property had already been sold to an innocent third party.

On points of law, Plaintiff submitted firstly, that the agreement between the parties was a sale of land in instalments, and accordingly s 8 (1) (b) of the Contractual Penalties Act [*Chapter 8:04*] applies. Consequently, the defendant was obliged to give, in writing, 14 days' notice to rectify the breach in terms of clause 5 of the agreement or 30 days' notice of cancellation of the agreement in terms of the Act, whichever was longer. Since exh 4 was a letter notifying that the agreement had been cancelled, rather than notice that it will be cancelled, the cancellation was therefore unlawful.

Secondly, plaintiff submitted that defendant was not entitled to retain the payment made, in cash or kind, as the agreement of sale does not contain any forfeiture clause, but rather, entitles defendant to claim for damages for breach. The plaintiff further submitted that because the defendant accepted delayed performance, she was not entitled to the penalty of cancellation and retention of the purchase price as such was not expressly provided for in the agreement, and in any event was contrary to s 6 of the Contractual Penalties Act.¹

Thirdly, the plaintiff submitted that since defendant admitted in her plea to having received US\$5 840.00 cash, ten bovines and the value of another four from plaintiff, in circumstances where she also sold the property in question to someone else and received payment therefor, she was thus unjustly enriched to the plaintiff's detriment.

¹ Plaintiff refers to S7, but that must be an error, as that section refers to the requirement for instalment sales of land to be in writing.

Fourthly, the plaintiff submitted that defendant waived her right to be paid in terms of the agreement, when, after the due date, she went to the Bishop to facilitate negotiation for her to be paid out of time, and thereafter, she continued to receive cash instalments in amounts contrary to the provisions of the agreement.

Finally, the plaintiff also submitted that the defendant in any case, offered to refund him the payments he had made and should be ordered to so refund.

Defendant

The defendant gave evidence on her own behalf. She testified that she sought mediation at the end of May 2013 after plaintiff's default. She denied agreeing to undetermined payments as and when plaintiff could afford, but claimed that she was compelled by the church to continue with the agreement and accept those uncertain payment terms. However, she did confirm that at the mediation meeting she was advised by the Bishop to cancel the agreement as plaintiff had no capacity to meet its terms.

The defendant denied receiving fourteen herd of cattle or negotiating with plaintiff for an increase of cattle from ten to fourteen. She also denied agreeing to a value of the extra four cattle or that she received such value. She therefore distanced herself from her plea.

Under cross examination, she alleged that plaintiff assured the mediation meeting that he would be able to meet his contractual obligations from his salary and his wife's salary. This testimony is at variance with the testimony of her daughter, the plaintiff and the Bishop's testimony, all of whom are agreed that it was evident that plaintiff had no capacity to meet the contractual obligations from salary income.

Defendant however supported the plaintiff and witnesses' testimony when she asserted that the meeting did not specifically agree on how the late payments were to be made. She also confirmed that she agreed that payments would be made even though due dates had long since passed.

Defendant contradicted her own evidence in chief where she had testified that plaintiff was to make monthly payments when, under cross-examination, she asserted that plaintiff was to make immediate payment from his and his wife's salaries. She even contradicted her earlier testimony under cross-examination that it was not agreed how payment was to be made.

I found the defendant to be an unreliable and untruthful witness, viz, how could immediate payment be made from salary at the beginning of the month when plaintiff could

only receive his salary at the end of the month? It is also instructive to note that she did not challenge the bishop's testimony that plaintiff was to make payments from tobacco sales.

On the points of law raised by plaintiff, defendant argued that the Contractual Penalties Act does not apply in this case, as it only applies to sales of land. She averred that what she sold was only her rights and interest in the property as she did not own it, but only held it as a cessionary from the local authority.

Further, she submitted that the agreement between the parties was properly terminated as 14 days' notice was given to remedy the breach and subsequent conduct by the parties reveals that they agreed that the agreement had been cancelled. She particularly alluded to plaintiff's concession under cross-examination that the agreement was terminated and the fact that negotiations for a refund could only have been mooted because the agreement had been cancelled.

In addition, defendant submitted that she did not waive her rights to be paid the purchase price in terms of the agreement as negotiations subsequent to plaintiff's default were aimed at ensuring that plaintiff rectified his breach and fulfilled his obligation to pay. This, she argued, was particularly since no written amendment to change the payment terms was ever entered into by the parties.

Defendant also submitted that plaintiff has not satisfied the requirements for a claim based on unjust enrichment and is therefore not entitled to a refund of payments made towards fulfilling his contractual obligations.

She further submitted that she is entitled to depart from her plea, during the trial, without seeking an amendment of such plea.

And finally, defendant submitted that it is for the plaintiff to prove that she is not entitled to retain the payment made, rather than for her to prove her entitlement to retain it, particularly since the agreement made no provision for reimbursement in the event of termination. She argued that it is the defaulting party who must not benefit from his breach and cannot be allowed to choose his remedy. On the contrary, she argued, as the innocent party, she is entitled to decide her remedy and in this case, she chose to cancel the agreement and retain the payments made.

She also called her daughter, Valerie Tendai Manjengwa to testify on her behalf. Valerie corroborated the testimony of Bishop Makiwa that defendant was advised that plaintiff had no capacity to service the agreement and therefore that defendant was better advised to cancel the sale. She contradicted the defendant's testimony that the mediation with

the Bishop was at the end of May 2013, but corroborated the plaintiff's testimony that the mediation was actually at the beginning of May 2013. This tallies with the payments subsequently made, as, at the time the mediation started, plaintiff had not paid anything towards complying with the agreement.

Valerie also contradicted defendant that she was compelled by the church to pursue the agreement. Instead, she testified that the Bishop actually sympathised with defendant and advised her to cancel the agreement as he was shocked that plaintiff had entered into it when he lacked capacity to pay.

Analysis of the case

I am of the view that this matter could be decided on the basis of the contract between the parties. Should I be wrong, I will deal with the issue of whether the Contractual Penalties Act applies last.

Did defendant waive her rights to cancel the agreement and claim damages?

The law

Waiver can be direct where a party, expressly or consciously and with full knowledge and intent demands to abandon his/her rights or declares his/her intention to waive those rights.

Alternatively, waiver can be inferred from conduct. In such a case, "the conduct must seek no reasonable doubt as to the intention of the party surrendering the right in issue."² However, because there always operates a presumption against waiver, the onus remains on the party alleging waiver to show that the party alleged to have waived his/her rights, did so with full knowledge of those rights, by conduct plainly inconsistent with an intention to enforce her/his rights.³ Mere delay or "standing by" does not automatically translate to waiver, but may be taken into account by the court in deciding whether or not there was waiver by conduct.⁴

Application of the law to the facts

² Brightpoint (Pvt) Ltd v Posts and Telecommunications Corporation & 3 Others HH110/03.

³ Laws v Rutherford 1924 AD 261 @ 263. See also, Agribank v Machingauta & Anor 2008 (1) ZLR 244.

⁴ See also Lallemand v Lallemand 2003 (2) ZLR 178.

It is not alleged by plaintiff that defendant expressly or directly declared her intention to waive her rights. Rather, the plaintiff's argument is that, by her conduct, defendant waived her rights under the agreement.

It is not disputed that plaintiff defaulted right at the outset: he failed to deliver ten bovines by 18 March 2013, nor did he pay \$10 600.00 by 30 April 2013. Instead of, at the very least, giving notice to rectify the breach on pain of cancellation and claim for damages in terms of the contract between the parties, defendant sought mediation from her church and plaintiff's superiors, according to her, at the end of May 2013, long after plaintiff had defaulted.

And even after being informed by her Bishop that plaintiff could not possibly afford to buy the property on his salary, defendant still went on to accept payments as and when plaintiff could possibly manage to pay. It was not disputed that the outcome of the dispute resolution before the Bishop was that plaintiff could still comply with the contract based on his salary and that of his primary school teacher wife. However, the court takes judicial notice that the plaintiff's stipend and his primary school teacher's wife could not have topped \$1 000 a month. And after deducting living expenses, the plaintiff could not have managed to liquidate the deposit of \$10 600.00 due on 30 April 2013 before the end of 2013, let alone make enough savings to pay the balance of \$15 000.00 by 30 April 2014.

Defendant further made the incredulous averment that she was compelled to comply with the Bishop's mediation outcome and hence accept the late and irregular payments from plaintiff by the church. Incredulous because she never met with the "church" but with the Bishop accompanied by one or two other elders, who, according to her own testimony, advised her to rather cancel the contract as plaintiff was incapable of adhering to it.

In her testimony, defendant claimed that the agreement was null and void because plaintiff breached it, yet even after such breach and therefore, nullity, she still went on to demand and accept tardy payments quite contrary to the agreement. In his closing remarks, the defendant's lawyer submitted that the plaintiff's obligation "to pay was still operational and that the defendant was still expecting the payment of the purchase price," even after the breach. It is not clear on the papers or in her testimony, on what legal basis defendant still expected payment of the purchase price after breach, cancellation of the agreement and subsequent re-sale of the property, since the agreement did not so provide.

Granted, the defendant is entitled to choose her remedy as the wronged party subsequent to plaintiff's breach. But, she is sending mixed signals. On the one hand she

wants payment of the purchase price. On the other, she claims breach and therefore cancellation in which case she would be entitled to damages. She cannot have both, but must elect which remedy to pursue. She cannot have her cake and eat it too.

It seems to me therefore that defendant was clearly aware that the agreement was no longer valid because of breach, but instead of cancelling it, consciously and deliberately entered into negotiations to receive payments out of time. According to her plea, she received fourteen bovines or their value after 15 May 2013. I do not believe her attempts to claim otherwise.

Further she received cash payments into her account totalling \$5 840.00 between 9 May 2013 and 2 September 2013.

Clearly, even if there was no written variation or amendment of the agreement, the parties were no longer being governed by the strict terms of the agreement in their dealings.

In my view therefore, such conduct is inconsistent with the desire to enforce her right to cancellation and damages in terms of the agreement. Rather, it is evidence of a departure from the strict terms of the contract and could reasonably be construed as a waiver of defendant's right to cancel the agreement and claim damages. Unlike the *Lallemand (supra)* case, defendant's conduct was not mere delay to exercise her right. In the face of plaintiff's breach, she consciously and actively sought performance which was contrary to the terms of the agreement.

I therefore find that, in negotiating different payment terms, defendant waived her right to cancel the agreement and claim damages on the basis of plaintiff's failure to adhere to Clause II b) and c).

Was there lawful termination of the agreement?

The law

Once plaintiff failed to pay the instalments on time, defendant ought to have given 14 days written notice for the plaintiff to rectify the breach in terms of Clause 5 of the agreement of sale before she could terminate the contract and claim damages.

Application of the law to the facts

However, instead of giving notice defendant negotiated for belated payments which were contrary to the agreement of sale and which she received and accepted, thus throwing the entire framework of the agreement into disarray. Thereafter, she caused a letter to be written by her lawyers on 20 November 2013, not giving 14 days' notice to rectify the breach, but in fact "to confirm the cancellation of the contract and to approach (defendant) for a refund (of his money)."⁵

I cannot understand how defendant claims that a letter to "confirm" cancellation can be notice of termination in terms of the agreement. Nor can I accept that the prior negotiations for changed payment terms can be regarded as clear and unequivocal notice of intention to cancel the agreement as envisaged in *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326. As I have already found, such conduct is more likely to be construed as a waiver of rights to payment under the original instalment terms in the agreement.

In fact, with regard to her conduct prior to the letter dated 20 November 2013, the defendant herself testified that she did not give notice to or cancel the contract but felt constrained to abide by the outcome of the mediation of the church.

It is therefore my finding that in failing to give 14 days' notice of intention to cancel the agreement, the defendant terminated the contract unlawfully.

Is there a valid claim for unjust enrichment?

The law

The law with regard to unjust enrichment is properly stated by the parties as follows:

- i) The defendant must be enriched
- ii) The enrichment must be at the expense of the plaintiff
- iii) The enrichment must be unjustified
- iv) Non of the classical enrichment actions must be applicable
- v) No rule of law refuses an action to the impoverished party.⁶

Application of the law to the facts

By her own admission, defendant sold to plaintiff her rights and interests in a property which she held under cession and for which she required the consent of the Local Authority

⁵ See the last paragraph of Exhibit 4

⁶ *Gamanje (Pvt) Ltd v City of Bulawayo* SC94/04.

to so sell. In her testimony, she did not allege that such consent was in fact obtained, nor did she produce any proof to that effect.

The agreement of sale itself does not suggest that plaintiff was aware that he was only buying defendant's rights and interest in the property as a cessionary. It merely promises that defendant would pass transfer once the purchase price is fully paid, which the defendant could not possibly do as she did not have any title to transfer.

It therefore seems to me that the agreement was entered into as a result of fraudulent misrepresentation or material non-disclosure which placed its validity into question. And had this point been argued before me and I had found the agreement not be valid, then defendant would not have been entitled to the purchase price, let alone its retention upon termination. As a result, her withholding of the purchase price would amount to unjust enrichment.

However, since the parties did not argue this point before me, I am unable to decide whether or not defendant was unjustly enriched based on this point.

The plaintiff's argument was simply that since defendant received the portion of the purchase price from him, cancelled the sale and resold the property to someone else and received the purchase price again, retention of the plaintiff's payment would enrich her as she would have been paid twice for the same property, while plaintiff would be impoverished by paying for property which was sold to a third party.

The defendant on the other hand claims that there is no unjust enrichment as she was entitled to receive the purchase price based on the agreement of sale between the parties.

It seems to me that the fact that defendant received the purchase price for the same *merx* twice (from plaintiff and from a third party to whom the *merx* now belongs), in circumstances where she has not claimed damages for breach (and therefore retention of the purchase price in lieu of damages), against plaintiff, unjustifiably enriches her. Consequently, Plaintiff paid for property which he cannot ever have, and is thus impoverished.

I do not even think that it was necessary for the plaintiff to plead unjust enrichment. Once it is shown that the defendant received the purchase price from plaintiff and then retained the property for onward sale to someone else and received further payment, the onus shifted to her to prove that she was not unjustly enriched.⁷ She could have done this by counterclaiming for damages and an order to retain the purchase price in lieu thereof, which she elected not to do.

⁷ See *First National Bank of Southern Africa Ltd v Perry NO and Others* 2001 (3) SA 960 (SCA) para 31

Is plaintiff entitled to a refund of the purchase price?

The law

In terms of the agreement of sale between the parties, no provision was made for the defendant to retain the purchase price upon breach or termination of the agreement of sale. Clause 5 only entitled her to claim damages, which she had to prove. Any retention of the purchase price could only be in lieu of damages.

Secondly, and in any event, where the requirements for unjust enrichment have been met, a plaintiff is entitled to a refund or payment of the amount of his impoverishment at the expense of a defendant.⁸

Application of the law to the facts

The agreement of sale does not entitle defendant to retain the purchase price. This fact seems to have been tacitly acknowledged in exh 4, wherein defendant, in paragraph 1 and 2, demanded damages. Further in paragraph 2, defendant tendered a refund of the purchase price. While in her plea, defendant avers that the purchase price was to be retained by her upon cancellation for breach, this is not borne out by the agreement. Neither did she counterclaim for retention of the purchase price in lieu of the damages that she was entitled to.

Ergo, there is no legal basis for her to hold on to the purchase price and she must refund it.

Therefore, only the matter of the quantum of refund is outstanding. Defendant claimed that she only received ten herd of cattle valued at \$4 400.00 and \$5 840.00 in cash for a total received of \$10 240.00. However, defendant tied herself up in knots because in her plea and summary of evidence, she admitted that she received the value of the four extra bovines. However, in her testimony, she sought to dissociate herself from her plea, and according to her counsel, she was entitled to do so.⁹

I cannot agree with the imputation being given to GARWE J's statement by defence counsel. It is my considered view that the judge meant that HE could go beyond the pleadings filed, not that a party could abandon their plea without seeking to amend it. Any abandonment of a plea, in my opinion, automatically means the defendant has no grounds for defending the plaintiff's claim and his/her defence would have to be struck off.

⁸ See *Gamanje (supra)*

⁹ See *Goldenmillion Engineering (Pvt) Ltd v Mettalon Gold Zimbabwe (Pvt) Ltd* HH 86/13.

On the other hand plaintiff asserted that because he was having challenges raising cash, he discussed and agreed with defendant that he should give her an extra four herd of cattle valued at \$2 700.00, making a total of \$12 940.00. The plaintiff produced, unchallenged, a Stock Movement Voucher (exh 2), clearly showing fourteen bovines were moved from his pen. This coupled with defendant's admission in her plea, I have no doubt that she received the value of the extra four bovines as claimed by plaintiff.

In any event, in my assessment of the parties' testimony, I found the plaintiff's case to have more coherence and amply supported by documents and the testimony of the witnesses, particularly, the parties' Bishop, whose evidence defendant failed to impugn.

I have no hesitation therefore in accepting that defendant received fourteen bovine or their value of \$7 100.00 in addition to the cash payment of \$5 840.00, which she should refund to the plaintiff.

Consequently, plaintiff's claim succeeds in its entirety.

Does the Contractual Penalties Act [Chapter 8:04] apply?

Having come to the conclusion that based on their agreement, the plaintiff is entitled to a refund of the purchase price, it is not necessary for me to decide on whether the Contractual Penalties Act applies in this case.

DISPOSITION

Consequently, it is ordered as follows:

1. The defendant be and is hereby ordered to pay to the plaintiff the sum of \$5 840.00.
2. The defendant be and is hereby ordered to return to the plaintiff 14 bovines, within 14 days of the date of service of this judgment, failing which the defendant be and is hereby ordered to pay to the plaintiff the sum of \$7 100.00
3. The defendant shall pay interest at the prescribed rate on the amounts in both paras 1 and 2 above from 20 November 2013 until the date of payment in full.
4. The defendant shall pay costs of suit.