

LAWRENCE MASANGA
versus
GERALD SIBANDA

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 20, 21 September & 13 December 2021

Civil Trial

Musarura, for the plaintiff
Zhuwarara with *G Ndlovu*, for the defendant

MUZOFA J: The plaintiff's claim is for eviction of the defendant, holding over damages and costs of suit. The defendant opposed the claim and also filed a counter claim.

In respect of the main claim the facts which are common cause from the pleadings and evidence led are as follows. The plaintiff is the registered owner of a property known as subdivision A of Matsheumhlope otherwise known as number 60 Circular Drive Burnside, Bulawayo. On the 23rd of August 2006 the plaintiff entered into an agreement of sale with the defendant for the sale of the property in the sum of \$15 billion which was revalued to \$15 million.

In terms of the agreement of sale a deposit of \$1.5 million was payable upon signature. The balance was payable on transfer of title. The initial deposit was paid in terms of the agreement. The defendant took occupation of the property before payment of the balance. The balance was subsequently deposited with the conveyancers. According to the plaintiff, transfer could not be effected as a result of an impossibility. He then cancelled the agreement.

The defendant disputed the claim by the applicant in that he complied with the terms of the agreement and there was no supervening impossibility. He also made a counter claim for a declaration that the agreement is valid and transfer of title to him.

At the pre- trial conference the parties agreed to have the following issues determined during trial:-

1. Whether or not a valid sale of agreement was concluded and performed?
2. Whether or not the plaintiff is entitled to the remedy of eviction in this matter?
3. Whether or not the plaintiff effected valid refund of the purchase price?
4. Whether or not the defendant is liable to the plaintiff for holdover damages in the sum? of us\$450-00 per month from 31 August 2018 to date of giving vacant possession?

The Plaintiff's case

The plaintiff gave evidence in his case. His evidence was brief. He stated that he sold the property to the defendant. When the deposit was paid he gave vacant possession of the property to the defendant. When the initial deposit was paid, his legal practitioners commenced processes to effect transfer. He was advised by his legal practitioners that the Zimbabwe Revenue Authority (ZIMRA) which is required to issue a Capital Gains Tax (CGT) rejected the purchase price agreed by the parties. It indicated the purchase price did not reflect the true value of the property. At that time the defendant had deposited the balance of payment with his legal practitioners. Since at that time there was hyperinflation he intended to unlock value in the money paid. He requested for the release of part of the money, the defendant declined and insisted on the transfer first. Transfer became impossible due to ZIMRA's conduct. He then instructed his legal practitioners to cancel the agreement and refund the defendant the purchase price. This was done on the 15th of February 2009. The defendant continued to occupy the property at no cost, he has refused to vacate from the property.

In respect of the holding over damages, he indicated that he checked with similar houses how much they cost. It is on that basis that he claims USD 450-00 per month.

Under cross examination he conceded that he did not put much effort to compel ZIMRA to accept the purchase price. Even when the defendant sought to compel ZIMRA to issue the CGT he opposed the granting of such relief. I presume the opposition was due to the eroded value of the purchase price.

In respect of the counter claim the plaintiff's position was that he did not benefit from the purchase price as he returned it to the defendant. The agreement of sale was not cancelled

as a result of a breach but due to an impossibility. He prayed for the dismissal of the counter claim.

Defendant's case

The defendant gave evidence. His evidence was similar to that given by the plaintiff. Save that he fully complied with the terms of the agreement. He paid the deposit and deposited the balance of payment with the plaintiff's legal practitioners. He did not refuse to release part of the purchase but he insisted on transfer to safeguard his interests. He was advised of ZIMRA's response. At his expense he caused a valuation to be conducted by a reputable company, Bulawayo Real Estate. It assessed the value as \$18 million. The value was also declined by ZIMRA. The price assessed was not so different from the agreed price.

He filed an urgent chamber application to compel ZIMRA to assess the Capital Gains Tax. The Provisional order was granted. However it was dismissed on the return date. He defaulted. He confirmed that he did not seek rescission of the judgment. According to him the agreement of sale was improperly cancelled. There was no impossibility. The plaintiff could have done something about the ZIMRA' stance not to issue the CGT.

The claim must be dismissed and the counter claim granted. He satisfied his part of the agreement. The refunded money is irrelevant in this case since he did not use it .It remained in the account and was eventually eroded by inflation.

Factual Analysis

It is common cause that the sale took place during the hyperinflationary period. The agreement of sale did not set out the date for the payment of the balance. Obviously due to the economic environment parties must have in their minds that it was payable as soon as possible. I do not accept that the defendant failed to pay the balance. He actually deposited it with the conveyancers. Although the plaintiff's reason for cancellation is convoluted it is clear that he cancelled the agreement of sale because he could not access the purchase price due to the delays in the transfer. The sole cause for non the transfer was the non-processing of the CGT.

The defendant's evidence was that the information about ZIMRA's refusal was given as an afterthought. I do not believe so. The defendant was advised by the conveyancers of the challenges in obtaining the CGT. He was asked to have the property assessed. He did so. It seems there was no communication as to what ZIMRA's response. The conveyancers advised the defendant later, that the price was also declined.

I address the issues referred to trial. The first, second and third issues are dependant. I will address them at the same time.

There is no doubt that the parties entered into a valid agreement of sale. Both parties confirmed it. The defendant performed in terms of the contract. The plaintiff failed to perform and cancelled. There was no performance. The plaintiff did not rely on breach of contract for cancellation but a supervening impossibility. If then, is unnecessary to consider whether the agreement was properly cancelled in terms of the agreement.

The court must determine if there was a supervening impossibility to release the plaintiff from his obligation. Both parties referred to the relevant law on what constitutes a supervening impossibility. The impossibility must be proved by evidence. It must be shown that performance became impossible due to the impossibility. See *Standard Chartered Finance v China Shougang International SC 49/13*.

This is matter based on contract, besides the terms of the contract, the court has to look at whether there was a meeting of the minds of plaintiff and defendant on the issue of impossibility. In the case of *Jordaam v Trollip 1960 PH A25 (T)* although the court was not addressing the issue of impossibility it had this to say on meeting of the minds of the parties.

“Although the minds of the parties must come together, courts at law can only judge from external facts whether this has not occurred. In practice, it is the manifestation of their wills and not the unexpressed will which is of importance.”Wessels JA in *SAR & H v National Bank of SA Ltd 1924 AD 704* at 715 said;

“The Law does not concern itself with the working of the minds of the parties to a contract, but with the external manifestation of their minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seem to have met, the law will, where fraud is not alleged, look to their acts and assume that their minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of the contract.”

UCHENA JA in the case of *Telecontract (Pvt) Ltd t/a Telco v Sparrow Hawllier (Pvt) Ltd t/a J & J Transport SC 41/2017* quoted with approval the words of Blackburn J in *Smith v Hughes (1871) LR 6QB 597* that;

“If, whether a man’s real intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into the contract with him, the man thus conducts himself would be equally bound as if he had intended to agree to the other party’s terms.”

In this case, the defendant was advised of ZIMRA’s request initially for a valuation report. He obtained it and submitted to the plaintiff’s legal practitioners. While ZIMRA made

its enquiries the plaintiff wanted to access the purchase price. He could not access it as the defendant also wanted to protect his interest. The CGT could not be assessed due to ZIMRA's conduct. No evidence was placed before the court from ZIMRA. However there is sufficient evidence that this was common cause. A letter from the plaintiff's legal practitioners was placed before the court which outlined ZIMRA's position. In my view the defendant also understood that the purchase price agreed between the parties was not acceptable to ZIMRA. His email to the plaintiff's legal practitioners dated 31 January shows that the valuation of the property was already an issue. Secondly the defendant filed an urgent chamber application to compel ZIMRA to assess the CGT. By making the application the defendant did not perceive the plaintiff as failing to comply with the terms of agreement. He understood that transfer could not be effected in the absence of the CT's there was a meeting of the minds by both parties that ZIMRA had declined to accept the purchase price as reflected in the agreement of sale.

The next issue related to this finding is whether ZIMRA's refusal to accept the purchase price constitutes an impossibility.

Impossibility arises where a party is prevented from performing his contract by vis major or casus fortuitous. The impossibility must relate to the contractual obligations. See Christie's Law of Contract in South Africa, 7th Ed. I can do no better than Patel JA (as he then was) who elucidated the concept in *Firstel (Pvt) Ltd v Net One Cellular (Pvt) Ltd* SC 1/15 as follows

It is trite that the courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arm's length. Thus, the suspension of a contractual obligation by dint of *vis major* or *casus fortuitus* can only be allowed in very compelling circumstances. The courts are enjoined to consider the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility. See *Watergate (Pvt) Ltd v Commercial Bank of Zimbabwe* 2006 (1) ZLR 9 (S) at 14B-F. In particular, it must be shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative. See *Chiraga v Msimuko* 2002 (2) ZLR 368 (H) at 380C-E, where it was held that shortage of foreign currency did not constitute an absolute supervening impossibility. Again, the contract must have become finally and completely impossible of performance as opposed to the situation where one party is only temporarily disabled from fulfilling its obligations. See *Beretta v Rhodesia Railways Ltd* 1947 SR 48 at 49-50; *NUST v NUST Academic Staff & Others* 2006 (1) ZLR 107 (H) at 109A-D; *Mutangadura v TS Timber Building Supplies* 2009 (2) ZLR 424 (H) at 429C-F.

In terms of s14 of the Capital Gains Tax (Chapter 23:01) the Commissioner General may determine the fair market price of property for the purpose of determining the capital gain or capital loss. The purchase price of a property is therefore important in the determination of CGT. For transfer to be effected the CGT is a requirement. No transfer can

be effected in its absence. It is a *sine qua non* for transfer to be effected. In this case the conveyancers could not obtain the CGT. There is no way they could have effected transfer. To my mind once ZIMRA had declined to accept the purchase price agreed between the parties it meant transfer could not be effected based on that agreement of sale. Even if the Commissioner General or and Estate Agent had come up with an acceptable value, it meant the parties had to enter into another agreement or vary the initial agreement to reflect the new purchase price.

It then follows that, in respect of the agreement of sale relied upon by the parties performance became absolutely impossible to perform. That the plaintiff did not do anything to compel the assessment of CGT is not factually true. What the plaintiff's legal practitioners did is all that is expected. The determinant factor is that ZIMRA did not agree with the purchase price. This is not a situation where performance was temporarily disabled neither was it relative. Although the plaintiff highlighted the issue of the erosion in value of the purchase price due to inflation. I do not understand that to mean the plaintiff cancelled the agreement on that basis. This was secondary to the real issue that transfer could not be effected due to the unavailability of the CGT. I find that there was a supervening impossibility

It is unclear what the parties meant by whether a valid refund of the purchase price was made. In my view, the plaintiff repudiated the contract. Upon repudiation the purchase price was deposited into the defendant's bank. The defendant's legal practitioners were advised. What the defendant did with the money does not detract from the fact that the purchase price was deposited into his account. The court understands the defendant's frustration but the fact remains that the purchase price was refunded. This is indeed a sad case. The court tried to find some middle ground for the parties and suggested to the parties to renegotiate the purchase price. The defendant was simply obstinate. He was not prepared. He said he had paid for the property. He did not accept that a refund was made, yet in reality it was made.

The plaintiff is the registered owner of the property. He is entitled to the property under the *rei vindicatio*. Where it is shown that a possessor so possesses the property against the owner's will, no court discretion is allowed except to protect the rights of the owner. There are no equities or pleas of mercy that can be considered. See *Alspite Investments (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236, *Nzara v Kashumba* SC 18/18 .The plaintiff has shown that the defendant is occupying the property against his will. He is entitled to the relief sought.

In respect of holding over damages. The plaintiff based his claim on information he obtained from a tenant in 2017. The claim is for holding over damages from 2018. There was no evidence of the value of rentals as at that time. Holding over damages require proof, a party must show how he/she settled for the figure claimed. In this case there must be proof of the market rental value of the property. The US\$450-00 claimed can be said to have been plucked from the air and cannot be granted. See *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S). The claim is unsustainable.

On the counterclaim

Having found for the plaintiff it naturally follows that the counterclaim must be dismissed. I find no reason to award costs against any party considering that the plaintiff succeeded partially.

In the result, I make the following order.

1. The defendant and all those claiming occupation through him shall vacate No 60 Circular Drive, Burnside, and Bulawayo within 14 days of this order failure of which the deputy Sheriff be and is hereby authorized to evict the defendant from the said property.
2. The plaintiff's claim for holding over damages is dismissed.
3. The defendant's counter claim is dismissed.
4. Each party to bear its costs.

Madotsa & Partners, plaintiff's legal practitioners

Masiye-Moyo and Associates c/o Gill Godlonton & Gerrans, defendant's legal practitioners

