

**REPORTABLE (89)**

(1) YUSUF ABDULLAH GAIBIE (2) MILLY MIRIAM GAIBIE  
N.O  
v  
(1) ALEXANDER PAULO CASTANHEIRA (2) RACHEL SALU  
CASTANHEIRA

**SUPREME COURT OF ZIMBABWE  
GARWE JA, BHUNU JA & MAKONI JA  
BULAWAYO: 24 MARCH & 27 MARCH 2020**

*G. Nyoni*, for the appellants

*P. Dube*, for the respondents

**MAKONI JA:** This is an appeal against the whole judgment of the High Court sitting at Bulawayo in which it granted absolution from the instance against the appellants` claim.

**FACTUAL BACKGROUND**

This is a contractual dispute. The appellants and the respondents entered into an agreement of sale in respect of a certain piece of land being Stand 710 Bulawayo Township in the District of Bulawayo known as Sunkist Flats situate at No 68 Samuel Parirenyatwa Street/Corner 6<sup>th</sup> Avenue, Bulawayo (“the property”). In terms of the agreement the purchase price of the property was in the sum of Z\$11 500 000 000.00 (eleven billion five hundred million dollars) payable in instalments. The first instalment of Z\$5 000 000 000.00

(five billion dollars) was to be paid upon signing of the agreement and was duly paid. The second instalment of Z\$5 000 000 000.00 (five billion dollars) was payable by 27 January 2006 and the third instalment of Z\$1 500 000 000.00 (one billion five hundred million dollars) upon the respondents taking occupation of the property.

On 27 January 2006 the respondents paid Z\$1 800 000 000.00 (one billion eight hundred million dollars) instead of the agreed Z\$5 000 000 000.00 (five billion dollars). After the respondents failed to pay the remaining amount within the stipulated time, the parties signed an addendum to the agreement of sale allowing the respondents an extension of time within which to pay the remaining amount. It was signed by the parties on 16 February 2006 and it gave the respondents up to 28 February 2006 to pay the remaining balance. Pursuant thereto, the respondents made further payments.

It is common cause that by 28 February 2006 they had not cleared the amount outstanding. A further payment was made on 3 March 2006. By that date a total of Z\$ 9 200 000 000.00 (nine billion two hundred million dollars) had been paid by the respondents leaving a balance of \$ 2 300 000 000.00 (two billion three hundred million dollars). The respondents allegedly held on to this amount in the belief that the amount was to be paid to the sellers' conveyancers in terms of Clause 4.5 of the agreement of sale.

On 15 March 2006, the appellants wrote a letter to the respondents giving them 30 days' written notice to remedy their breach failing which the appellants would cancel the agreement. The letter further required the respondents to pay the sum of Z\$2 300 000 000.00 (two billion three hundred million dollars) to their conveyancers Messrs Baron &

Partners as provided for in the agreement as well as the outstanding interest charges as provided for in the addendum.

The respondents paid an additional amount of \$ 1 200 000 000.00 (one billion two hundred million dollars). After getting no further response from the respondents pursuant to the letter of 15 March 2006 in respect of the outstanding amount, the appellants instituted proceedings in the court *a quo* against the respondents. They claimed cancellation of the agreement of sale. They tendered a refund of all the amounts paid as the purchase price as at the date of the summons. They further claimed costs of suit on the attorney and client scale in the event that the respondents opposed the matter.

The respondents denied breaching the agreement of sale and stated that they had complied with the agreement by paying the purchase price in full.

The matter was referred to trial on mainly two issues. The first issue was whether the defendants (the respondents) had breached the contract. The other issue was whether the plaintiffs (the appellants) were entitled to cancel the agreement based on the defendants' breach. The appellants gave evidence on their own behalf and closed their case. Thereafter the respondents applied for absolution from the instance arguing that the appellants had not proved a *prima facie* case as they had failed to prove any breach of the agreement of sale and a right to cancel the agreement.

On 5 July 2018, the court *a quo* granted the respondents' application for absolution from the instance reasoning that the plaintiff's case was full of glaring

inconsistencies and unacceptable variances with the pleadings filed of record. It found that the appellants had failed, at the close of their case, to establish a *prima facie* case.

The appellants, aggrieved by that decision, filed the present appeal on the following grounds

**“GROUNDS OF APPEAL**

1. The court *a quo* erred in law by granting absolution from the instance when the appellants had established a *prima facie* case of breach of contract by the respondents which breach entitled the appellants to cancel the contract.
2. The court *a quo* grossly misdirected itself on the facts by concluding that the appellants received the full purchase price set out in the contract when there was sufficient evidence to the contrary and no reasonable court applying its mind to the evidence on record and the test for absolution from the instance could have arrived at the same conclusion.
3. The court *a quo* grossly misdirected itself on the facts by concluding that the appellants had admitted that they had received the full market value of the property agreed upon at the time of contracting when there is no basis for such a conclusion and no reasonable court could have arrived at the same conclusion.
4. The court *a quo* erred in law by concluding that the appellants are not entitled to cancel the contract on account of breach by the respondents because the appellants allegedly breached the contract first, which alleged breach by the appellants was never pleaded by the respondents as a defence to the appellants` claim.
5. The court *a quo* erred in law by applying the *contra preferentum* rule against the appellants when there was no ambiguity at all as to the breach committed by the respondents and the appellant`s right to cancel the contract.”

Notwithstanding the number of grounds of appeal raised by the appellants, the court takes the view that the present appeal turns on the sole issue of whether or not the court *a quo* was correct in granting the application for absolution from the instance made by the respondents.

## THE APPLICABLE LAW

The law to be applied in the present circumstances was eloquently articulated by MAKARAU JA in *Competition and Tariff Commission v Iwayafrica Zimbabwe (Pvt) Ltd* SC 58/19 at paras 13-15 where she said the following:

“[13] The law on when a court may grant absolution from the instance at the close of the plaintiff’s case is settled. (See *Supreme Service Station (1969) (Private) Limited v Fox & Goodridge Limited* 1971 (1) ZLR 1 (A) and *United Air Charters (Private) Limited v Jarman* 1994 (2) ZLR 341 (S). The court granting absolution must be satisfied that there is no evidence before it upon which a reasonable court might find for the plaintiff.

[14] Expressed differently, the court considering an application for absolution from the instance must ask itself if there is no evidence at all on each and every essential averment that the plaintiff must make to sustain the cause of action. If there is some evidence on all the essential averments, absolution should not be granted. If there is evidence on some but not on all the essential averments, absolution may be granted, for in that instance, the plaintiff will not be able to sustain and perfect its cause of action. This is so because an application for absolution from the instance stands on pretty much the same footing as an application for the discharge of an accused person at the close of the state case *albeit* on a lower threshold of the burden of proof.

[15] It follows then that a court granting absolution must be clear on the essential averments that a plaintiff has to make to sustain the cause of action.”

See also *United Air Charters (Pvt)Ltd v Jarman* 1994 (2) ZLR 341 (S) at 343.

## APPLICATION OF THE LAW TO THE FACTS

*In casu*, it is common cause that the appellants` cause of action was breach of contract. Clause 1.1 of the agreement which regulated the purchase price and its payment provided as follows:

“The purchase price of the property shall be the sum of \$11 500 000 000 (eleven billion five hundred million dollars) which shall be payable in accordance with the provisions specified under Special Conditions elsewhere in this agreement.”

The relevant part of the Special Conditions clause provided as follows:

“4.2 THE FIRST PAYMENT in the sum of \$5 000 000 000-00 (Five Billion Dollars) shall be payable upon signing of this agreement by RTGS transfer to an account to be advised.

4.3 THE SECOND PAYMENT in the sum of \$5 000 000 000-00 (Five Billion Dollars) shall be payable on or before the 27<sup>th</sup> January 2006 by RTGS transfer to an account to be advised, else the Midrate applies thereafter.

4.4 THE THIRD PAYMENT in the sum of \$1 500 000 000-00 (One Billion Five Hundred Million) shall be payable on the Purchaser obtaining occupation of the property.

4.5 The two parties agree that any amounts paid shall be immediately released to the sellers save for any amounts required by law to be of the Conveyancers on account of Capital Gains Tax.

...

4.8 In the event that the sum of \$10 000 000 000-00 (Ten Billion Dollars) deposit shall not have been paid in full by the 10<sup>th</sup> February 2006 the Sellers shall have the right to cancel the Agreement forthwith notwithstanding to the contrary containing this Agreement.”

The addendum to the agreement granted the respondent extension of time to pay the outstanding amount by 28 February 2006.

The appellants argue that the second instalment of Z\$5 000 000 000 was not paid in full as was required by the agreement and that the respondents only paid Z\$1 800 000 000.00 (one billion eight hundred million dollars) thus leaving a balance of Z\$3 200 000 000.00 (three billion two hundred million dollars). The second instalment ought to have been paid by 27 January 2006. The respondents do not deny this but seek to aver that the addendum to the agreement granted them an extension to pay the outstanding amounts by 28 February 2006.

While that may be true, it is also correct that by the time the extension provided by the addendum had expired, the respondents had not yet paid the full Z\$11500 000 000.00 (eleven billion five hundred million dollars) as required by the agreement of sale as read with the addendum. Instead, they had only managed to pay Z\$9 200 000 000.00 (nine billion two hundred million dollars) leaving a balance of Z\$2 300 000 000.00 (two billion three hundred million dollars). The last payment towards the purchase price was paid on 14

July 2006. In addition, it is common cause that on 15 March 2006 the appellants wrote to the respondents giving them 30 days' notice in which to pay the outstanding amounts which they failed to do.

The respondents argued that they paid the purchase price in full to the 2nd respondent's account. The balance of Z\$2 300 000 000.00 (two billion three hundred million dollars) was to be paid to the appellants' conveyancers. By the time the appellants issued summons they (the appellants) had not opened a file with their conveyancers.

It is this Court's view that the respondents have to explain why they failed to pay the amount they claimed was due to the conveyancers upon being advised of the identity of the conveyancers. It is common cause that the respondents attempted to pay by cheque and it was returned by the bank in April 2006. It was not clear why the cheque was returned.

Regarding the issue of whether the appellants were entitled to cancel the agreement, it is this Court's view that it is a question of interpretation of the agreement as read with the addendum. This can only be done after the court would have heard evidence from both sides. As it is, the Court has heard the appellants' side only.

In this vein therefore, the appellants established a *prima facie* case of breach of the agreement by the respondents. The full amount, as stated in the agreement, had not been paid at the time of issuance of the summons.

Once evidence has been adduced which constitutes *prima facie* proof of breach, then such evidence may become proof on a preponderance of probabilities and a

plaintiff will succeed in proving his or her case. The courts must be slow to grant absolution from the instance and this point was made in *Katerere v Standard Chartered Bank Zimbabwe Ltd* HB 51/08 which was quoted with approval in *Bakari v Total Zimbabwe (Pvt) Ltd* SC 21/19. It was stated that:

“The court should be extremely chary of granting absolution at the close of the plaintiff’s case. The court must assume that in the absence of very special considerations, such as the inherent unacceptability of the evidence adduced, the evidence is true. The court should not at this stage evaluate and reject the plaintiff’s evidence. The test to be applied is not whether the evidence led by the plaintiff establishes what will finally have to be established. Absolution from the instance at the close of the plaintiff’s case may be granted if the plaintiff has failed to establish an essential element of his claim- *Claude Neon Lights (SA) Ltd v Daniel* 1976 (4) SA 403(A); *Marine & Trade Insurance Co Ltd v Van Der Schyff* 1972 (1) SA 26(A); *Sithole v PG Industries (Pvt) Ltd* HB 47-05.”

The same point had been made earlier on in *Manyange v Mpfu & Ors* 2011

(2) ZLR 87 (H) at 88 F-H where it was stated that;

“The test to be applied as to whether to grant absolution is not whether the evidence for the plaintiff establishes what would finally be required to be established to obtain judgment. It is whether the plaintiff has made out a *prima facie* case against the defendant on the basis of which the court could or might find for the plaintiff. A reticent defendant should not be allowed to shelter behind the procedure of absolution from the instance. In practice the courts are loath to decide upon questions of fact without hearing all the evidence from both sides, and have usually inclined towards allowing the case to proceed. At this stage of the trial it is not pertinent to evaluate the weight of the evidence adduced or the preponderance of probabilities, save where such findings are manifest from the evidence already heard.”

See also *Chombo v Minister of Safety and Security*.

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It bears mention that the appellants only had to prove a *prima facie* case and their evidence a *quo* cannot be characterized as having been manifestly unsatisfactory,



unreliable or that it failed to establish an essential element of the claim. An arguable case was made out and the respondents ought to have been put to their defence.

At the hearing of the matter, counsel for the appellants, Mr Nyoni, sought to argue that the court *a quo* did not apply its mind to the matter that was before it for the reason that the judgment of the court *a quo* is a regurgitation of the respondents (then defendants *a quo*) submissions. He submitted that the court *a quo* simply adopted the evidence and submissions of the respondents without independently assessing it and without having regard to the appellants' submissions.

*Per contra*, Ms Dube for the respondents argued that this was not an issue that had been raised in the grounds of appeal and thus could not be properly raised for the first time at this hearing. On the merits she argued that the court *a quo* did not produce a biased decision and for authority she relied on the case of *Stuttafords Stores (Pty) Ltd and Others v Salt of the Earth Creations (Pty) Ltd* 2011 (1) SA 267 (CC).

In that case, the Constitutional Court of South Africa, in no uncertain terms, refrained from determining the question whether the extensive use of counsel's heads of argument could lead to a perception of bias because it was not a question before it. It merely expressed its views on such conduct. The views are *obiter* and not binding.

However, *in casu* it is apparent that the court *a quo* did not regurgitate the submissions made by the respondents in the court *a quo*. There are differences between the submissions and the final judgment. As a result, the court takes the view that while it may be

undesirable for a court to plagiarize counsel's heads of argument in a judgment, this does not necessarily, without more, amount to a misdirection.

## **DISPOSITION**

The appellants have managed to establish that the court *a quo* misdirected itself in granting absolution from the instance when the appellants had established a *prima facie* case. The appeal has merit and must succeed.

Accordingly, it is ordered as follows:

1. The appeal be and is hereby allowed with costs
2. The judgment of the court *a quo* is set aside and substituted with the following:

“The application for absolution from the instance be and is hereby dismissed”

**GARWE JA**

I agree

**BHUNU JA**

I agree

*Moyo & Nyoni*, appellants` legal practitioners

*Lazarus & Sarif*, respondents` legal practitioners