

SITHEMBINKOSI MOYO

Versus

ELINA MUSHAKWE

And

**THE MINISTER OF LOCAL GOVERNMENT,
PUBLIC WORKS & NATIONAL HOUSING**

IN THE HIGH COURT OF ZIMBABWE

MABHIKWA J

BULAWAYO 10, 18 NOVEMBER 2020; 1 JUNE & 4 NOVEMBER 2021

Civil Trial

A. Mhaka for the plaintiff

Ms T. Musoso, for 1st defendant

No appearance for 2nd defendant

MABHIKWA J: The plaintiff issued summons against the defendant claiming the following relief that;

- (a) Transfer or cession of stand number 3621 Woodlands Park Phase 1, Gweru, against a tender of payment of US\$5 000,00 balance on the purchase price.
- (b) Ultimately, payment of US\$11 000,00 being refund of the part of the purchase price plaintiff paid to 1st defendant.
- (c) In the event of a refund of the purchase price, interest thereof at the prescribed rate calculated from the date of when payment was made to the 1st defendant to the date when payment is received by the plaintiff.
- (d) Costs of suit.

The plaintiff alleged in short that in May 2017, she and the 1st defendant entered into an agreement of property known as stand number 3621 Parklands Park Phase 1 in Gweru for a price of US\$16 000,00. *Inter alia*, the parties agreed that the plaintiff would pay a deposit of US\$5 000,00 on the date of signing the agreement, another US\$5 000,00 on 5 June 2017 and the balance of US\$6 000,00 in monthly instalments of US\$250,00 commencing on 15 August 2017. The

plaintiff would then receive transfer and possession of the property after full payment of the purchase price.

It was alleged that the plaintiff duly paid the purchase price up to US\$11 000,00 but abruptly and without reasonable cause, the 1st defendant refused to accept any more payments from her. To that extent, the 1st defendant thus breached the terms of the agreement of sale and despite due and lawful demand, she has failed, refused or neglected to perform her part of the agreement. The applicant was therefore seeking specific performance or alternatively refund plus interest a *tempore morae* from the date which payment was made to the date of any refund.

Plea

The 1st defendant's plea was just four (4) lines of four (4) sentences. It was the defendant's plea that plaintiff is the one who materially breached the agreement by unilaterally stopping payments of the purchase price. She denied refusing to accept payment. She further stated that the agreement provides for remedies to be followed by an aggrieved party.

At the commencement of trial, *Mr Mhaka* for the plaintiff indicated that as far as he knew, the defendant was to be represented by a *Mr Zishiri* of Messrs Garikayi and Co. Legal practitioners. He was not in attendance and had not communicated with him at all. The defendant confirmed that she too did not know why *Mr Zishiri* was not in attendance. She told the court that she was ready to proceed with trial without him.

Sithembiso Moyo

The plaintiff testified that she is a 54 year old widow residing at number 1197 Mkoba 20 Township in Gweru. She is a nurse at the National Railways of Zimbabwe. She and defendant entered into an agreement of sale of a house. The defendant (the seller), was represented by *Mr Zishiri* of Garikayi and Company who drew up a written agreement for the parties. It was duly signed by the parties and their witnesses. It was tendered and marked as exhibit 1.

In terms of the agreement, the property subject of the sale was stand number 3621 Woodlands Park, Phase 1, Gweru. The total purchase price for the property was US\$16 000,00 (sixteen thousand United States dollars). US\$5 000,00 was to be paid at the time the parties signed the agreement. It is common cause that this was done and the agreement was duly signed. US\$5 000,00 was to be paid on 5 June 2017. The plaintiff says that this was done although she clarifies that with the consent of the defendant, she paid US4 000,00 plus US\$1

000,00 into the defendant's bank account. This was less than a month from the initial US\$5 000,00 payment. She then started paying the US\$250,00 monthly instalments for the balance of US\$6 000,00.

After making four (4) monthly instalments totaling US\$1 000,00 *Mr Zishiri* sent the 1st defendant and a man referred to as her "agent". The 1st defendant told her that *Mr Zishiri* had received a letter from the High Court ordering her (plaintiff) to stop payments because the house has been given to a man who had purchased it first. This surprised her because on the day of signing the memorandum of agreement of sale, *Mr Zishiri* and the 1st defendant had indeed mentioned that there had been an earlier sale but they had finalized with that person.

The plaintiff became skeptical about the alleged High Court letter and demanded to see *Mr Zishiri* and asked him about the letter allegedly written by the High Court stopping her from making further payments. *Mr Zishiri* confirmed the existence of the letter. She demanded to see it. *Mr Zishiri* said he did not have it. *Mr Zishiri* further told her that in light of the said high Court letter, they had decided to refund her the \$11 000,00. Considering the time, and the changing monetary values and monetary policies, she refused to accept the refund except on two (2) conditions;

- (a) Firstly, she demanded the High Court order or letter that she should stop the payments.
- (b) After seeing the order, she would only accept the same currency that she had paid (United States dollars) plus interest thereof in order to be able to buy another house considering her ill-health and advancing age.

They failed to show her the High Court letter or order. Instead, *Mr Zishiri* started dodging her. When the 1st defendant and her lawyer became evasive, she sought assistance from the Ministry of Justice. She was referred to the Legal Aid Directorate. A Mr Ndlovu of the Legal Aid Directorate wrote ("Exhibit 2") which is a letter requesting a round table conference for the parties and their lawyers. There was no response from Messrs Garikayi and Co. and their client. Mr Ndlovu wrote several other letters including "exhibit 3 and 4. In exhibit 4, Mr V. Ndlovu sought the position on the ownership of stand number 3621 Woodlands Park, Gweru. The letter was addressed to the Ministry of Local Government, Public Works and National Housing. Plaintiff denied that she is the one who breached the sale agreement and insisted on specific performance or in the event of impossibility, a refund of the US\$11 000,00 plus interest thereof.

In cross-examination, 1st defendant simply alleged that plaintiff had been making erratic and delayed payments especially on the US\$250,00 instalments which the plaintiff denied. There was no mention at all of Mr Peter Dube referred to in exhibit 3 who the 1st defendant had allegedly sold the house first.

Somewhere under cross-examination, the 1st defendant asked if she could be allowed time to look for a different lawyer. *Mr Mhaka* representing the plaintiff did not object. She requested for a week and the matter was postponed to 18 November 2020, the 1st defendant appeared apparently injured seriously and with a swollen face especially on the eyes and cheeks. She also had a clinical card. She said she had been involved in an accident before securing legal services. She made another request for a further postponement. Again there was no objection from *Mr Mhaka* and the matter was postponed with no order as to costs of suit.

When the matter resumed on 1 June 2021, the 1st defendant was represented by *Ms Musoso* who continued the cross-examination. Her cross-examination was centered on the fact that in terms of the agreement, if the seller breached it all she had to do was to refund the money paid. Counsel went further that in light of SI 33/19 plaintiff should be refunded RTGS\$11 000,00, not United States dollars. This was basically the evidence she gave in court. She states that the plaintiff made erratic payments. However even in her own evidence in chief, she says she is the one who swiped the US\$250,00 for the September instalment in the absence of the plaintiff. She had been given her card to use. Yet under cross-examination, she claimed that she had a challenge because she failed to do or did not know what to do with the money that plaintiff was paying, so she used it. This cannot be true because in some cases as in September she herself used plaintiff's card to swipe and take money from plaintiff's account. Further, she never claimed in her plea that the plaintiff was failing to pay as agreed. In fact, the 1st defendant's evidence differed materially from her plea. She too agreed in cross-examination but claimed that it is unfortunate that her erstwhile lawyers had slept on the job and did not write as she had instructed them.

What is worrisome in this matter is that from the evidence in court and in papers, some of which are filed as exhibits, the reason given to plaintiff by the 1st defendant, her erstwhile lawyer a *Mr Zishiri* and an alleged agent was that the plaintiff should stop any further payments for the purchase of the house on the allegation that the High Court had directed that the "house" be retained by one Peter Dube who had bought it before the plaintiff. When the plaintiff demanded to see the High Court's directive, it could not be produced until *Mr Zishiri*

disappeared completely from the matter. Even in this matter, papers show that he represented the 1st defendant right up to the point pre-trial conference memorandum done on 27 January 2020. At the start of the trial on 10 November 2020, 1st defendant herself was expecting her lawyer but was not aware why he was not in attendance. Letters that include exhibit 2 which the Legal Aid Directorate wrote to Messrs Garikayi and Co Legal Practitioners on 14 February 2018 made reference to Peter Dube. In fact the letter sought to confirm whether it was true that 1st defendant had entered into an agreement of sale with plaintiff when she had previously sold the same stand to one Peter Dube. Peter Dube himself at some stage allegedly approached plaintiff and told her that the stand was his. Having had no response to this and other letters, the Legal Aid Directorate wrote exhibit 4 to the Ministry of Local Government. The letter was simply enquiring on the ownership of the property as it was being suspected that there could have been a double sale to Peter Dube and Sithembinkosi Moyo by Elina Mushakwe.

Surprisingly, throughout her cross-examination of the plaintiff and in her own evidence, the 1st defendant was completely quiet and the issue of the double sale and the alleged High Court directive. In fact only very belatedly in re-examination by *Ms Musoso*, she made insinuations of threats from her in laws. There were also threats of shooting her from her husband who works in South Africa and who apparently may have sold the house earlier on to Peter Dube.

I am convinced therefore, that faced with the threats from both her husband and his relatives over the sale to plaintiff, the 1st defendant decided to stop plaintiff from making any further payment. She and her lawyer falsely used the reason that the High Court had directed that the house be given to Peter Dube. However, in spite of the alleged threats the house is registered in the 1st defendant's names.

It appears to me also that having been sued after refusing to accept payment, and to produce the High Court directive, the 1st defendant realized that a double sale would be illegal. She then gave a very short defence that it is the plaintiff who unilaterally stopped payment and thus breached the agreement.

Surprisingly, in court she now states exactly the opposite. She now admits that she stopped the plaintiff but claims this was because of her erratic payments. I am inclined to agree with *Mr Mhaka* for the plaintiff that the 1st defendant's plea and her evidence are completely incongruent.

In any event, I am not convinced that the 1st defendant stopped payment because of plaintiff's alleged erratic payments. This was a reason so simple to give. She would have said so at the time she refused to accept payments. She and her lawyer would have said so in response to the numerous letters from the Legal Aid Directorate which they allegedly did not reply. Further, she would have simply said so in her plea. I am convinced that 1st defendant stopped payments because of the double sale and of the threats from her South African based husband and her relatives. She thus breached the agreement between herself and the plaintiff.

In *Savannah vs Marere (NO) & Ors* 2009 (1) ZLR 230 (S). On 30 October 1998 the appellant and the late Robert Mubayiwa Marere entered an agreement of sale of stand number 151 of plot 216 of Good Hope Township of Good Hope. In terms of a clause 12 of the agreement the total of \$230 000,00 was to be paid (a) by a deposit of \$50 000,00 into a Trust Account on the date of signing the agreement and (b) monthly instalments of \$30 000,00 per month with effect from 1 July 1998, until the balance of \$180 000,00 was liquidated.

Or alternatively

That within fourteen days of the date of the agreement, the purchaser would pay or furnish a bank or building society guarantee for payment of the purchase price against transfer being effected by the seller's conveyancers.

It is not in doubt that in appropriate circumstances, a party to a contract has the right to claim specific performance. As always, it is the discretion of the court whether to grant such an order or not. The court in *Savannah vs Marere (supra)* also pointed out that:

“The right to claim specific performance by the plaintiff is premised on the principle that the plaintiff must first show that he has performed all his obligations under the contract or that he is ready, able and willing to perform his side of the bargain, or that he has been prevented from doing so by the defendant. The court will not decree specific performance if plaintiff has himself broken the contract or made a material default in the performance.” Also in *Mufakose Housing Co-operative Society vs Magozore* 2007 (1) ZLR 175 (H).

The court held that it has a discretion in compelling specific performance under a contract. However, the court in that case could not compel a citizen to associate with another against his will even if he was so bound in re-contract.

The housing co-operative had sought that *Magozore* should share the house with a stranger to him against his will.

In *Agricultural Bank of Zimbabwe Ltd vs Nickstate Investments (Pvt) Ltd & Ors* 2010 (1) ZLR 419 (H), the court per GOWORA J (as she then was) held that:

“Where there has been a breach of contract, the innocent party has a choice of claiming specific performance or claiming a sum of money (*ad pecunium solvendam*) as a remedy. Where a purchaser claims specific performance in respect of the item contracted for, he chooses not to crystallise his claim. By making this choice, he shows a willingness to treat the obligation by the seller as still continuing.” See also *John Soraclie vs Sunati Manzani and Municipality of Marondera* HH-36-19.

I am convicted that the plaintiff *in casu* has sufficiently performed her obligations under the contract, that she is ready, able and still willing to perform her side of the bargain. She was however unceremoniously stopped from making further payment by the defendant on the false claim that there was a High Court order or letter stopping her from making further payments and granting the house subject of the sale to one Peter Dube. The defendant did not even give notice of cancellation of contract for the plaintiff to consider and this is stipulated in their agreement. She can be held to specific performance.

See *Zimbabwe Express Svcs (Pvt) Ltd vs Nuanesti Ranch* 2009 (1) ZLR 326 (S) and *Lasagne Investments (Pvt) Ltd & Ors vs Highdon Investments (Pvt) Ltd & Ors* 2010 (1) ZLR 296 (H).

I now turn to the 1st defendant’s prayer in her closing submissions. 1st defendant claimed in court and submitted that the last part of clause 7 (b) of the parties’ memorandum of agreement of sale entitled her to refund the plaintiff the purchase price paid at the time of breach, which is US\$11 000,00. She then prays that plaintiff should be refunded her monies paid as purchase price and that the money be paid in RTGS at the rate of one to one with the United States dollar in accordance with SI 33/19 section 4 (1) (d).

I am not persuaded to accept 1st defendant’s argument. I have already stated of course that the court has a discretion to grant or not to grant specific performance. At the same time, I am cognizant of the fact that the court should not re-write or re-make the parties’ agreement. *In casu*, I notice two (2) things. Firstly, I note that the 1st defendant, whether by design or unwittingly, omits to mention the greater and more important part of clause 7 of the agreement which in fact is against her own actions in the breach. She then goes to the last part of

clause 7 (b) which would make her retain the house for almost a worthless value as compared to the US\$11 000,00 paid by the plaintiff from August to November 2017. The court cannot grant an order that would give such an absurdity and unfairness.

In *Zimbabwe Express Services (Pvt) Ltd vs Nuanesti Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S-21-09) *supra* per GARWE JA (as he then was) the court held as follows that:

“the order for specific performance is at the discretion of the court and there are circumstances in which a court may refuse to grant such an order. The court which the court makes should not produce an unjust result which would be the case if, for example, in the particular circumstances, the order would operate unduly harshly on the defendant. This would be the case if the plaintiff were to be unjustly enriched by being able to acquire something that was worth a great deal by paying virtually nothing, the value of the money having been severely eroded by inflation by the time the case was adjudicated.”

The court in that case also made reference to the fact that there must be given a notice cancellation. The notice of intention to cancel the contract must be clear and unequivocal, such that the other party is, or ought to be aware of its nature. *In casu*, 1st defendant did not even give any notice of cancellation of the contract notwithstanding that this was provided for in clause 7 (a) of the memorandum of agreement. For the avoidance of doubt, clause 7 states that;

“7. BREACH

- (a) **In the event of breach of any of the terms of this agreement by the purchaser, the seller shall be entitled to remit to the purchaser’s address as set out herein calling upon the purchaser to fulfill his/her obligation within (14) fourteen days of the date of the letter. Should the purchaser fail to do so, the seller shall have the right to cancel the agreement.**
- (b) **In the event of breach of any of the sums of this agreement by the seller, the purchaser shall have the same right of cancellation as the seller in (a) above, subject to refund of any or all the purchase price paid at the time of breach.”**

Section 7 is therefore clear that if the breach is by the purchaser, then section 7 (a) comes in where the seller has the right to cancel the agreement if he so wishes. If the breach is done by the seller, section 7 (b) operates and it is the purchaser who exercises the right to cancel. The seller cannot have it both ways. She cannot, as she eventually does in this case, argue that even if she had breached the agreement, plaintiff (the purchaser) should have invoked section 7 (b). Not so, she cannot, after breaching the agreement herself, then seek to refund in terms of clause 7 (b). It is for the purchaser (plaintiff in this case) to make that election.

I am convinced *in casu* that the plaintiff has shown the court that she is entitled to specific performance. It is accordingly granted.

I therefore order as follows that:

1. The defendants be and are hereby ordered to effect transfer or cession of stand number 3621 Woodlands Park Phase 1, Gweru against a tender of payment of US\$5 000,00 balance on the purchase price.
2. The 1st defendant pays the costs of suit.

Mhaka Attorneys, plaintiff's legal practitioners
Kwande Legal Practitioners c/o Mlweni Ndlovu & Associates, 1st respondent's legal practitioners