

HAWKFLIGHT ENTERPRISES (PVT) LTD

Versus

CRISPEN GUDOSHAVA

IN THE HIGH COURT OF ZIMBABWE

DUBE-BANDA J

BULAWAYO 21, 22, & 30 SEPTEMBER 2021 & 11 NOVEMBER 2021

Civil trial

T. Masiye-Moyo with L. Nyamapfeni, for the plaintiff

B. Robi, for the defendant

DUBE-BANDA J: This is a case of eviction based on the common law remedy of *rei vindicatio*, a remedy available to an owner to claim back property in possession of another. The action is contested by the defendant. At the center of the dispute is stand number 492 Emthunzini Township, Bulawayo (the property). Plaintiff seeks an order for the eviction of the defendant from the property on the basis that he is in unlawful possession of such property, and costs of suit.

In its declaration plaintiff pleads as follows: it is the owner of stand number 492 Emthunzini Township, Bulawayo, and on the 5th September 2011, it entered into an agreement of sale with the defendant in respect of this property. The purchase price of the property was USD\$20 880.00, and it was agreed that a deposit of USD\$1 400.00 was payable before signing of the agreement of sale. It was further agreed that defendant will take possession of the property and pay a monthly instalment of USD\$162.20 until the debt was liquidated. Defendant made some payment following the signing of the agreement. On the 24th April 2021, defendant served plaintiff with a letter withdrawing from the agreement, and demanded a refund of RTGS\$8 866.00. Plaintiff duly complied and paid defendant the refund. Subsequent to the cancellation / termination of the agreement, defendant ceased to have a right of possession of the property. It is on this basis that the eviction of the defendant from the property is sought.

In his defense, defendant pleads as follows: that the letter of cancellation / termination of the agreement was withdrawn before it was accepted by the plaintiff. On the 25th July 2019, defendant revoked his cancellation of the agreement. The revocation was before plaintiff paid the refund. The attempt to cancel the agreement followed plaintiff's illegal demand to be paid

in United States Dollars, which demand plaintiff considered illegal and a contravention of the law. Plaintiff then misrepresented that it shall refund defendant in United States Dollars. There was no consensus on the cancellation as it was induced by misrepresentation. Plaintiff refunded defendant in RGTS Dollars. Defendant refused to accept the refund and in turn paid the balance of the purchase price in full. Plaintiff has no right to evict defendant from the property.

In its replication plaintiff pleads as follows: that the decision to cancel the agreement was the defendant's decision. Plaintiff did not promise to refund him in United States Dollars. Defendant no longer has a right to remain in occupation of the property.

At the pre-trial conference held before a judge the following were identified as the issues for trial:

1. Whether or not the defendant cancelled the agreement of sale between the parties and demanded a refund as provided for in the agreement of sale.
2. Whether or not plaintiff misrepresented to the defendant that plaintiff will refund the defendant in United States Dollars.
3. Whether or not plaintiff has any right to evict the defendant.

The parties are on the opposite sides of the fence in this matter. In its endeavor to prove its case, plaintiff adduced the evidence of two witnesses and tendered a number of documentary exhibits. Defendant testified and called the evidence his wife, one Josephine Dube. I recount the evidence led at the trial in brief.

Plaintiff's case

To prove its case, plaintiff adduced oral evidence from two witnesses and tendered a number of documentary exhibits. The first witness for the plaintiff was Martin Moyo. He testified that he is employed by the plaintiff as the Operations Manager. It is in that capacity that he is familiar with the facts of the case. On the 5th September 2011, the parties entered into an agreement of sale in respect of the property. Plaintiff was the seller and defendant the purchaser. A copy of the agreement of sale between the parties was tendered and is before court marked Exhibit A1.

He testified that defendant's monthly instalments fell into arrears. He was not paying regularly. Defendant visited plaintiff's offices sought clarification from this witness, who referred him to the Accountant. After a discussion with the Accountant, defendant left, came

back and said he was not happy. On the 24 April 2019, defendant delivered a hand written letter of cancellation of the agreement at plaintiff's offices. The letter was tendered in evidence and is before court marked Exhibit A2. This witness testified that after receipt of the letter, he advised Accounts Department to refund defendant. The Accountant made some calculations and concluded that a refund of \$2 725.00 was due to the defendant. Defendant rejected a refund of \$2 725.00, arguing that it was not in terms of the agreement of sale. Sometime in June 2019, defendant's legal practitioner, a Mrs. Drau from Pundu & Company went to plaintiff's offices and demanded a refund of \$8 866.00. As a follow up to the visit, the legal practitioner addressed a letter to plaintiff, the letter was tendered and is before court as Exhibit A3. In the letter, the legal practitioners demanded a refund of \$8 060.00 to be paid to the defendant. The legal practitioners provided bank details for the transfer of the refund. The refund was paid into the legal practitioners' bank account.

Subsequent to the payment of the refund, the legal practitioners wrote a letter to plaintiff contending that the refund had not been paid and that defendant now wanted the agreement of sale to be reinstated. The letter is before court as Exhibit A4. This witness testified that plaintiff did not accept to reinstate the agreement of sale. Plaintiff refunded defendant on the 30th August 2019. Exhibit A5 is proof of such refund. This witness denied that plaintiff was induced to cancel the agreement.

Under cross examination, this witness testified that defendant visited the offices before he wrote Exhibit A2. That the defendant had a very bad paying record, as a result his instalments were in arrears. At a later date Pundu & Company, defendant's erstwhile legal practitioners returned the \$8 866.00 to plaintiff. The money is currently in the Trust Account of plaintiff's legal practitioners. He testified that defendant cancelled the agreement because he was failing to pay in terms of the agreement. At the time of the cancellation defendant had paid \$13 000.00. In re-examination, this witness denied that defendant was forced or induced to cancel the agreement.

The second witness to give oral evidence for the plaintiff is Yazinimpilo Ndlovu. He testified that he is employed by the plaintiff as an Accountant. He knows the defendant as a client of the plaintiff. On the 24 April 2019, when defendant came to the plaintiff's office to pay his instalment, after he was receipted a dispute arose between defendant and the Cashier. The Cashier then referred defendant to this witness for the resolution of the dispute. The dispute was that defendant had paid RTGS 175.00, however there was an endorsement in the

receipt that the amount of RTGS 175.00 was equivalent to USD 43.75. This witness testified that he tried to explain to the defendant and a lady who was in the company of the defendant that the reference of the United States dollar equivalent was an internal administrative issue, it did not affect his payment and his instalments. Defendant could not understand the explanation and opted to withdraw from the agreement. Defendant then wrote a letter of withdrawal, Exhibit A2. The withdrawal letter had a qualification, being that defendant wanted to know the amount he would be refunded on withdrawal from the agreement.

This witness testified that he told the defendant that he would make calculations and then inform him of the exact refund amount. After calculations were completed the witness informed the defendant that the refund amount was \$2 735.00. Defendant disputed that this amount was correct. This witness testified that defendant was informed that he would be refunded in RTGS dollars. He was refunded on the 30th August 2019. The refund was transferred back to the plaintiff, defendant saying that he wanted to be refunded in United States dollars. He was never promised to be refunded in United States dollars. This witness informed the court that it took him thirty days to calculate the refund, because he hoped defendant would reconsider his position and not withdraw from the agreement.

Under cross examination, this witness merely repeated his evidence in chief. At the conclusion of the evidence of this witness, plaintiff closed its case.

Defendant's case

Defendant testified that he entered into an agreement with plaintiff for the purchase and sale of the property. The purchase price was \$20 880, and he paid a deposit of \$1 400, and the balance was payable in twelve years. He was paying his monthly instalments in the sum of USD\$162. 20, until 2016 when RTGS currency was introduced. The instalment of USD\$162. 20 was inclusive of USD\$17. 66 insurance premium. At some point plaintiff advised him to pay USD\$145.00, which amount excluded the insurance premium.

He testified that on the 20 January 2019, he proceeded to plaintiff's office to pay his instalment, he paid \$175. 00. The reason he was still paying \$175. 00, instead of \$145.00 was because his account was in arrears. This payment was converted and recorded as USD\$50 00. On the 24 January he made another payment of \$175.00 and it was converted and recorded as USD\$43.00. He said he asked the cashier and she said he had paid USD\$43.00 and this is the amount that will reflect in the books of accounts. The cashier advised defendant that if he had

queries he must talk to the Accountant. He testified that the Accountant informed him that the agreement was in United States dollars and the instalments are in United States dollars.

According to the defendant, the Accountant informed him that if he could not afford to pay in United States dollars, the agreement provides him with options. The Accountant provided the two options, the first, to opt out of the agreement and be refunded sixty percent of all payments made, and the second was to pay in United States dollars and so avoid the account falling into arrears. He was not satisfied with the explanation given by the accountant. In the company of his wife he returned to the offices of plaintiff and requested to talk to the operations manager. The manager advised him and his wife, that if they were unable to pay in United States dollars, they can opt out of the agreement and be refunded in United States dollars.

Defendant testified that he could not pay in United States currency as he was earning in Zimbabwean currency. There was nowhere he could get United States currency to pay the monthly instalments. He said he reasoned that if he does not opt out of the agreement he would fall into arrears and risked being evicted from the property in two to three months' time. He then opted for the refund option as he was promised to be refunded in United States dollars. He got a paper from plaintiff's reception and wrote a letter of cancellation, i.e. Exhibit A2. Sometime in May 2019, the accountant phoned him and advised that his refund has been calculated to be \$2 735.00. He proceeded to the office of the plaintiff, he queried the refund of \$2 735.00. He was then advised that plaintiff has referred the matter to its lawyers, he may also seek the services of a lawyer.

Defendant then sought the services of Pundu and Company Legal Practitioners. Mrs Drau a lawyer from Pundu and Company had a meeting with the representative of the plaintiff. Defendant was not in attendance in that meeting. Mrs. Drau later informed the defendant of the meeting and its outcome, she said there was an agreement that he will be refunded \$8 866.00 in RTGS Dollars. He queried and pointed out to the lawyer that he did not agree to be refunded in RTGS Dollars. Defendant then took it upon himself to write a letter to plaintiff's operations manager – Mr. Moyo to inform him that he will continue with the agreement and pay his monthly instalments. Mr. Moyo advised him to go and consult his lawyers.

He testified that at that time the refund had not yet been paid. He then instructed Mrs. Drau to write a letter to plaintiff indicating that defendant wants to be reinstated on his

agreement of sale and to continue paying his monthly instalments. The letter is before as Exhibit A4. On the 30 August 2019, he proceeded to the offices of plaintiff to make a payment, he was then shown a proof of payment of the refund in the sum of \$8 866.00. This refund had been paid to Pundu and Company. One day when he was at the property someone came and informed him that he had purchased the same property from plaintiff. He testified that he made full payment before the summons for eviction was issued.

Undercrosss-examination defendant testified as follows: that he is a graduate of Great Zimbabwe University. He has a degree in Accountancy. He wrote Exhibit A2 to opt out of the agreement with plaintiff, on the understanding that he would be refunded in United States dollars. He was left with no option but to withdraw from the agreement. He was forced to seek legal advice. Plaintiff did not suggest the law firm, it merely said seek legal advice. He chose Pundu and Company. He gave the lawyers his instructions regarding this matter. He testified that the letter marked Exhibit A3 was written without his instructions. Though the letter was written on the 5th June 2019 and ‘copied to client’ he only saw a copy of the letter on the 25 July. Mrs. Drau informed him that it was agreed with plaintiff that he shall be refunded in RTGS dollars. He made a final payment to plaintiff on the advice of his lawyers. He was not given a receipt. It was put to him that that payment was not put into the account because the agreement had been cancelled, his comment was that he does not accept that position. Asked whether he had taken any steps against his erstwhile legal practitioners, his answer was he does not know how to do that.

Defendant adduced the evidence of Josephine Dube. She testified that she is married to the defendant. She signed the agreement of sale (Exhibit A1) as defendant’s witness. Defendant told her that the Accountant gave him two option; to either pay in United States dollars or withdraw from the agreement of sales. She the accompanied defendant to the offices of the plaintiff to understand for herself the issue about the refund in United States dollars or to withdraw from the agreement. The Accountant said they just have to pay in United States dollars, or withdraw. The Operations manager said if they withdraw, they would be refunded in United States dollars. They were told the refund would be 60% per cent of the total amounts paid to the plaintiff. The refund was to be made in RTGS dollars, they did not agree to be refunded in such currency as they had paid in United States dollars.

This witness testified that they then sought legal assistance from Pundu and Company, Mrs. Drau. The lawyer was given instructions to negotiate the currency of the refund and the

amount of such refund. Mrs. Drau had a meeting with plaintiff where it was agreed that they be refunded in RTGS Dollars. When they approached plaintiff they were told that a refund has been paid direct to the trust account of the lawyer. The operations manager told them of the meeting with Mrs. Drau and the agreement that they be refunded in RTGS dollars. Mrs. Drau confirmed the meeting and the agreement to be refunded in RTGS dollars, she testified that they told the lawyer they did not agree to be refunded in such currency. Mrs. Drau said she would reverse the transaction. They addressed a letter to plaintiff, which the operations manager refused to accept and said they must bring a letter from their lawyer. That is when the lawyer wrote Exhibit A4. Defendant was then served with summons for eviction.

Under cross examination this witness testified that they opted to withdraw from the agreement, be refunded 60% of the total amount paid to plaintiff and then buy a property elsewhere. She said they saw Exhibit A3 on the 25 July 2020, at the lawyer's office. Mrs. Drau did not represent them correctly and correctly execute their instructions. They were unhappy with the agreement she reached with plaintiff, and then decided to ask her to withdraw from the case, that is when they sought the services of defendant's current legal practitioners.

Analysis of the evidence

I proceed to evaluate the evidence. The plaintiff must prove its case on a balance of probabilities. The balance of probability standard means that a court is satisfied that a fact or event occurred if the court considers that, on the evidence, the occurrence of the fact or event was more likely than not. In the overall adjudication of this case, I take into account that plaintiff's witnesses are mere office functionaries, testifying regarding their office functions. I did not detect an intention to mislead or peddle untruths. Their evidence is reliable and credible and in sync with the probabilities of the case. I accept it. Defendant and his witness were evasive and unreliable. Their evidence had a ring of artificiality and untruthfulness.

As evidenced by the present proceedings, the relationship between the parties became strained at some stage. According to the plaintiff, the strained relationship arose as a result of the defendant having failed to make regular payments in terms of the agreement of sale. According to the defendant he fell into arrears because plaintiff was demanding payment of instalments in United States dollars.

However the basic facts are uncontroversial. The plaintiff and the defendant entered into an agreement of sale in respect of the property. The purchase price of the property was USD\$20 880.00, deposit payment of USD\$1 400.00 and thereafter monthly instalments of USD\$162.20 until the debt was liquidated. Defendant paid a total sum of USD 13 000.00 towards liquidating the purchase price. Later defendant failed to make regular payments and the account fell into arrears. Defendant wrote a letter to plaintiff withdrawing from the agreement of sale. In the letter Exhibit A2, in the main he said he would like to withdraw from the contract due to the following reasons; he was unable to pay in United States dollars as he was earning in RTGS dollars. He stated that before his withdrawal was acceptance he wanted to know the amount he was to receive and the circumstances thereof.

It is common cause that the parties discussed the refund, i.e. the currency and the amount of such refund. The evidence shows that the parties did not agree on the currency and the amount of the refund. Plaintiff was offering to refund \$2 72.00. Which amount was rejected by the defendant. He then engaged the services of the Lawyers to represent him in this dispute with plaintiff.

The lawyers addressed a letter (Exhibit A3) to plaintiff, the material part which says sometime in April 2019, plaintiff changed the terms of the agreement and demanded payment of the outstanding amount in United States dollars. The letter says defendant explained that he could not pay in the United States dollars as he was earning in local currency. It is said plaintiff refused to accept payment in local currency prompting defendant to default his April and May instalments thus breaching the agreement of sale. The letter went on to say defendant by then had paid \$13 800.00 towards liquidating the debt. Plaintiff had offered to refund him \$2 700.00. This refund amount is disputed and the correct refund should be \$8 060.00. The letter concluded by saying the Lawyers had been instructed to demand payment in the sum of \$8 060, and such payment must be made within seven days failure of which litigation will ensue.

The undisputed evidence shows that a meeting was held between plaintiff and the Lawyers, Mrs Drau. Defendant did not attend this meeting. It is at this meeting that the Lawyers agreed that the refund should be paid in RTGS and in the sum of \$8 866.00. On learning of this agreement defendant told Mrs. Drau that he was not happy with it. Mrs. Drau then wrote a letter (Exhibit A4) to plaintiff, in the letter the point was made that since the last visit to plaintiff's offices on the 12 June 2021, payment has not been made in the lawyer's trust

account. Defendant wants to be reinstated on his agreement of sale and is willing to continue payment of his instalments subject to conditions as per plaintiff's adjustments. Plaintiff was advised not to make any payment to the lawyer's trust account, but to accept defendant's instalment payments. Plaintiff refused to reinstate the agreement of sale, and on the 30 August 2019, transferred the sum of \$8 866.00 to Pundu and Company Trust Account.

Plaintiff's case is that the agreement of sale in respect of the property was cancelled. Defendant has no basis at law to remain in occupation of the property. The principal issue that requires resolution is whether plaintiff has proved a case for *rei vindicatio*. In answering this question, one must determine whether defendant cancelled the agreement of sale and whether Messrs Pundu & Company Legal Practitioners in agreeing with the plaintiff regarding the currency and the amount of the refund were executing defendant's instructions.

Defendant contends that Mrs Drau had no authority to enter into such an agreement as she did. When a litigant charges his erstwhile legal representative with incompetence or neglect in following his instructions the primary question is whether the failure of representation the litigant alleges in fact occurred. In such a case the lawyer's response to the allegations is admissible in assessing the veracity of the complaint. See: *S v Tandwa* [2007] SCA 34 (RSA). The legal practitioner must be afforded an opportunity to place her version before court. The court will have to establish who between the litigant and his legal representative is telling the truth.

The most telling instance in this matter is the failure by the defendant to call Mrs Drau of Pundu and Company as a witness. In the joint pre-trial conference memorandum defendant indicated that he would call three witnesses. Defendant and Josephine Dube testified, leaving room for a further witness to testify. There was room for Mrs. Drau to testify. She was not called as a witness. This court would neither make a serious finding against a legal practitioner nor conclude that counsel did not provide proper, effective and competent legal representation without her version being before court or evidence that she is aware of the allegations being made against her.

To put the issue in a proper context it is significant to understand the reason Mrs. Drau was instructed by the defendant. Counsel was brought to the scene not for the purpose of negotiating a cancellation of the agreement. The agreement had been cancelled. Defendant had cancelled the agreement by Exhibit A2. She was brought to the scene because there was a

disagreement between the parties regarding the *amount* and the *currency* of the refund. Her instructions were to deal with these two issues.

In her letter dated 5 June 2019 (Exhibit A3) the legal practitioner demanded a refund of \$8 866.00 within seven days failure of which she would institute legal action. She subsequently held a meeting with plaintiff's officials and it was agreed that defendant would be refunded the sum of RTGS\$8 866.00. She provided her firm's banking details to the plaintiff. This demand and this agreement were based on the fact that the cancellation of the agreement of sale was a *fait accompli*. Counsel dealt with these two issues in turn, she negotiated the amount of the refund from \$2 700.00 to \$8 866.00. Again, she agreed with the plaintiff regarding the currency of the refund. Defendant is not happy with the currency of the refund, but does not mean counsel had no instructions to negotiate the currency of such refund. Counsel had such instructions.

The high watermark of the plaintiff's case is that the defendant cancelled the agreement of sale. The question that arises is whether plaintiff has made a case for the relief of *rei vindicatio*. The *rei vindicatio* is a remedy available to the owner to reclaim his property from whomever is in possession of it. The remedy is available to the owner in respect to both moveable and immovable property. The *rei vindicatio* is premised on the notion that an owner may not be deprived of his or her property against his or her will, and is entitled to recover property from any person who retains possession of it without his or her consent. Therefore, no other person may withhold property from the owner unless he or she is vested with some right enforceable against the owner such as a right of retention against the owner or a contractual right. It is trite law that possession should also be lawful in order to be a valid defence against the *rei vindicatio*. An owner who institutes the *rei vindicatio* is required to allege and prove that he or she is the owner of the thing; the thing was in the possession of the defendant at the commencement of the action; and the thing which is vindicated is still in existence and clearly identifiable.

Plaintiff's pleaded case is that on the 24th April 2019 (Exhibit A2), defendant served it with a letter of withdrawal from the agreement. Defendant demanded a refund payment of RTGS\$8 866.00 and plaintiff complied and made such payment. This is the case that plaintiff placed before court. It is argued that after cancelling the agreement of sale, there exists no basis at law for the defendant to remain in occupation of the property. The plaintiff is the owner of

the property. Defendant was in occupation of the property at the time of the commencement of the action. The property is still in existence and clearly identifiable.

The next question is whether the defendant has a right of retention. The burden of proof to establish any right to retain of possession of the property now rests on the defendant. And with this question the focus shifts to the merits of the defendant's defence. Defendant's pleaded case is that Exhibit A2 was withdrawn before plaintiff had accepted the cancellation. It contended that defendant revoked the cancellation on the 25th July before plaintiff had paid the refund. It is pleaded that the cancellation followed a misrepresentation to the defendant that he was to be refunded in United States currency. Again it is pleaded that there was no consensus on the cancellation as it was induced by a misrepresentation. It is further said defendant revoked his cancellation and paid the full purchase price.

Once it is accepted as a *fait accompli* that the agreement of sale between the parties was cancelled, defendant could not unilaterally revoke the cancellation and reinstate such agreement. In *Mwayera v Chivizhe & Others* SC 16 / 2016 the court said:

It is trite that cancellation is a unilateral act which takes effect as at the time of its communication to the other party to the contract. It requires no concurrence from the party receiving notification of the same. The effect of the cancellation was to put an end to the primary obligations between the parties. Primary obligations are those related to the performances due by the respective parties under the contract.

In *casu* the agreement was cancelled. The letter before court marked Exhibit A4, could not breathe life to a cancelled agreement. Plaintiff's position is that it had accepted the cancellation and this issue was no longer negotiable. A refund was made in the amount and currency agreed with the lawyers.

Defendant and his witness testified that he was allowed to make a payment to the plaintiff after Exhibit A4. This evidence is contradictory. On one hand they testified that plaintiff permitted them to make a payment, on the other hand that plaintiff refused to give a receipt on the basis that the issue was with the lawyers. No proof of payment was placed before court. Defendant's witness testified that they were told by the operations manager that they were refunded and no relationship existed between the parties. Again this issue of making full payment was not put to plaintiff's witnesses during cross examination.

In his written submissions Mr. *Robi* argues that the decision to write the cancellation letter, Exhibit A4 was not voluntary on his part. The submission that defendant did not write

Exhibit A4 voluntarily implies that he acted under duress. This is not defendant's pleaded case. A party cannot be permitted to plead one case, and then argue a different case. In fact the issue of duress is not borne out by the evidence. Again, it is contended that he was induced to write the letter. The plaintiff officials misrepresented to him that the refund amount would be 60% United States dollars of the total amount paid.

The issue of misrepresentation is itself a red herring. It cannot be correct that plaintiff undertook to refund defendant in United States currency, in his letter Exhibit A2 defendant made the point that before his cancellation is accepted he wanted to know the amount he would receive and the circumstances thereof. This shows that the issue of the refund amount and the currency thereof were not settled at that point in time. He subsequently engaged lawyers to specifically deal with these two outstanding issues. The lawyers agreed with the plaintiff regarding the amount and the currency long after the 24th April 2019, the date of Exhibit A2.

The issue that the lawyers had no instructions to agree on the currency of the refund was not pleaded. Even counsel for the defendant in his written submissions did not address this issue. This issue is significant in this matter and may not be wished away. The lawyers had instructions to negotiate the amount of the refund and the currency thereof. This is what the lawyers did.

A refund was paid to the trust account of the lawyers as *per* the banking details provided by such lawyers. The fact that the refund amount was re-transferred to the plaintiff is inconsequential.

I have found that defendant cancelled the agreement and was refunded as *per* currency and amount agreed between the parties. He has no right of retention of the property. On the issue of costs, no case has been made for costs on an attorney client scale.

Disposition

Plaintiff has proved its case on a balance of probabilities. In the result, I make the following order:

1. Defendant and all those claiming through him be and are hereby evicted from stand number 492 Emthunzini Township, Bulawayo.
2. Defendant to pay the costs of suit.

Masiye-Moyo & Associates, plaintiff's legal practitioners
Liberty Mcijo & Associates, defendant's legal practitioners