

THE PIT BULL FAMILY TRUST
versus
FIRST TRUST HOLDINGS LIMITED
and
THE REGISTRAR OF DEEDS
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 25 November 2021 & 10 November 2022

Opposed Court Application

S Hashiti, for the applicant
E Mubayiwa, for respondent

CHITAPI J: The applicant is a registered Trust. The applicant claims to have purchased a sizeable number of immovable properties in Harare from the first respondent on 18 November, 2018 for a total purchase price of USD \$1650.00. The sale was reduced to writing in an agreement in duly signed on behalf of both parties. The applicant has petitioned the court for an order to compel the first respondent to transfer the properties to the applicant against payment of the purchase price of USD\$1650 000.00. The first respondent opposes the application and prays for its dismissal with costs. It has described this application as “completely meritless.”

The relief sought by the applicant is set out in the draft order which claims alternative relief. The alternative relief seeks that the applicant be allowed in the alternative to deposit the purchase price for the credit of the first respondent, into the account of the third respondent whereafter the third respondent will then take such steps as are required of the seller of an immovable property meant to be transferred to take to enable transfer to be registered in the name of the purchaser. The draft order was couched as follows:

“WHEREUPON after reading documents filed of record and hearing counsel
IT IS ORDERED THAT

1. Against payment of \$ 1650 000-00 Third Respondent’s bank account by the Applicant, First Respondent shall within seven days sign all necessary documents in order to transfer the below mentioned property into Applicant’s name;

- i. An undivided 1.6% share being share No. 3
An undivided 2.22% share being share no. 4
An undivided 2.54% share being Share no. 5
An undivided 1.85% share being share no. 6
An undivided 1.85% share being share no. 7

All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Town measuring 2.1765 hectares registered in the name of First trust Holdings Limited and held under Deed of Transfer 3668/15 dated 25 August 2015.

- ii. An undivided 0.67% share being share No.8
An undivided 0.67% share being share No. 9
An undivided 0.67% share being share No. 10

All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3324/13 dated 28 August 2013.

iii. An undivided 2.20% share being shared no. 11 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holding Limited and held under Deed of Transfer 3325/13 dated 28 August 2013.

iv. An undivided 2.09% share being share no. 12 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3326/13 dated 28 August 2013.

- v. An undivided 1.46% share being Share No. 13
An undivided 1.46% share being Share No. 14
An undivided 1.46% share being Share No. 15
An undivided 1.46% share being Share No. 16

All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of transfer 3327/13 dated 28 August 2013.

vi. An undivided 10.65 share being Share No. 17 of a certain piece of land situate in the district of Salisbury called remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3328/13 dated 28 August 2013.

vii. An undivided 8.44% share being Share No. 18 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3329/13 dated August 2013.

- viii. An undivided 10.63% share being Share No. 19 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3343/13 dated 28 August 2013.
 - ix. An undivided 8.63% share being Share No. 20 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer number 3345/13 dated 28 August 2013.
 - x. An undivided 11.78% share being Share No. 21 of a certain piece of land situate in district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer number 3345/13 dated 28 August 2013.
2. Should the First Respondent fail to furnish the Applicant with its banking details, Applicant shall transfer the purchase price of \$ 1650 000-00 into the Third Respondent's bank account.
 3. Third Respondent shall be authorized to sign all documents necessary for the transfer of the properties listed in paragraph 1 into the name Applicant's name.
 4. First Respondent to pay cost of suit.

IN THE ALTERNATIVE

1. Again payment of USD\$ 1650 000-00 into Third Respondent's bank account by the Applicant, First Respondent shall within seven days sign all necessary documents in order to transfer the below mentioned property into Applicant's name;
 - i. An undivided 1.61% share being share No. 3
An undivided 2.22% share being share no. 4
An undivided 2.54% share being share no. 5
An undivided 1.85% share being share no. 6
An undivided 1.85% share being share no. 7
All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares in the name of First Trust Holdings Limited and held under Deed of Transfer 3668/15 dated 25 August 2015.
 - ii. An undivided 0.67% share being share No. 8
An undivided 0.67% share being share No. 9
An undivided 0.675 share being share No. 10
All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Holdings Limited and held under Deed of Transfer 3324/13 dated August 2013.
 - iii. An undivided 2.20% share being share no. 11 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3325/13 dated 28 August 2013.

- iv. An undivided 2.09% share being share no. 12 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3326/13 dated 28 August 2013.
 - v. An undivided 1.46% share being Share No. 13
An undivided 1.46% share being Share No. 14
An undivided 1.46% share being Share No. 15
An undivided 1.46% share being Share No. 16
All of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3327/13 dated 28 August 2013.
 - vi. An undivided 10.65% share being Share No. 17 of a certain piece of land situate in the district of Salisbury called remainder of stand 17 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3328/13 dated 28 August 2013.
 - vii. An undivided 8.44% share being Share No. 18 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of transfer 3329/2013 dated 28 August 2013.
 - viii. An undivided 10.63 share being Share No. 19 of a certain piece of land situate in the district if Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer 3343/13 dated 28 August 2013.
 - ix. An undivided 8.63% share being Share No. 20 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer number 3345/13 dated 28 August 2013.
 - x. An undivided 11.78% share being Share No. 21 of a certain piece of land situate in the district of Salisbury called the remainder of stand 71 Comet Rise Township measuring 2.1765 hectares registered in the name of First Trust Holdings Limited and held under Deed of Transfer number 3345/13 dated 28 August 2013.
2. Should the First Respondent fail to furnish the Applicant with its banking details, Applicant shall transfer the purchase price of USD\$1650 000-00 into the Third Respondent's bank account
 3. Third Respondent shall be authorized to sign all documents necessary for the transfer of the properties listed in paragraph 1 into the name Applicant's name.
 4. First Respondent to pay cost of suit."

The grounds of defence to the application advanced by the respondent as set out in the opposing affidavit were that the agreement of sale could not be given effect to because it was inchoate in that its validity was conditional upon the applicant having complied with clause 2 of the agreement. Clause 2 of the agreement provided as follows:-

"2. The purchase price shall be paid within thirty (30) days of signature of this agreement to the conveyancers in the following Nostro FCA Trust Account.

Account Name: Sawyer and Mkushi FCA Trust Account

.....

.....

Correspondent Bank: Deutsche Bank Company Americas New York

.....

.....

The purchase price shall be disbursed to the seller upon transfer of the property to the purchaser.”

It was the respondents’ contention that the respondent failed to pay the purchase price within the 30 days of signature of the agreement provided for in the clause. The respondent contended that such payment ought to have been made by 3 January, 2019. The respondent also contended that consideration had to be given to the provisions of clause 13.5 which provided for finality of the agreement. Clause 13.5 provided as follows:-

“5. The seller and purchaser acknowledge that the agreement constitutes the entire agreement between them and no other conditions, stipulations, warranties or representations whatsoever have been made by either party or their agents, other than such as are included herein. No variation, modifications addition, alteration orof the provisions of the agreement or consent or departure therefrom agreed to by any party shall have any force or effect unless it is reduced to writing and signed by both parties.”

The respondent contended that the applicant having failed to pay the purchase price as per the agreement, it gave notice to the applicant to remedy the breach of non-payment. The written notice dated 19 June, 2019 called the applicant’s attention to the non payment of the purchase price within the 30 days of signature of the agreement. The letter of notice written on the first respondents’ letterhead read as follows:-

Wednesday, June 19, 2019

THE PIT BULL FAMILY TRUST
26 Campbel Town Road
Bluff Hill
HARARE
Att: LISA IRENE MATAMBO

Dear Madam,

RE: AGREEMENT OF SALE- 62 THE CHASE

The above matter refers.

Please take note that Pit Bull Family Trust (“the Purchase”) is in breach of the Agreement of Sale entered between itself and First Trust Holdings Limited (the Seller”) dated the 16th November 2018 in respect of the aforementioned property, in that it failed to make payment of the purchase price within thirty (30) days of the signing of the agreement of sale as set out in **clause 2** of the agreement.

Now therefore, notice is hereby given in terms of clause 9 of the agreement that you remedy the breach within seven (7) days of your receipt of this letter, failing which, the agreement shall be deemed cancelled, and the Seller Shall exercise any further remedies available to it in terms of the agreement and at law.

Please be guided accordingly.

Yours faithfully,
For First Trust Holdings Limited

VANDER MUTENGA
FINANCE DIRECTOR

The first respondent attached an affidavit by the Frank Manhuwa, its employee driver. He deposed that he served the letter of the notice of breach and cancellation of the agreement at 26 Campbell Town Road, Bluffhill. On the advice of the first respondent’s legal practitioners he left the letter at the entrance of the premises because it was the address given in the agreement. He averred that the premises was under construction and that he could not after diligent search locate anyone at the premises.

The applicant denied in the answering affidavit that it received the alleged notice of breach and cancellation. It questioned the logic behind the first respondent choosing to communicate by delivery of a letter, yet communications were by e-mail and that in any event, since the matter was now being handled by Sawyer and Mkushi legal practitioner on behalf of the first respondent it

did not make sense for the first respondent to be making parallel communications. The applicant's representative also averred that had there been delivery of the letter of notice of breach and termination of the agreement, he would have seen it because he resided at the premises where delivery was allegedly made.

It seems to me that the real issue for determination is whether or not the sale agreement between the parties is still extant or was lawfully cancelled. The agreement provided in clause 9 and 11 as follows:-

“9. Notwithstanding anything to the contrary herein contained, the Seller shall, (i) in the event of the Purchaser failing to pay any sum owing under this Agreement on due date or (ii) otherwise committing a breach of any of the conditions hereof and failing to make such payment or remedy such breach within SEVEN (7) days after delivery of written notice as prescribed in this agreement requiring it to do so, be entitled, without further notice, in addition to and without prejudice to any other rights available at law:-

- 9.1 to claim immediate payment of the entire balance outstanding in terms hereof, although not otherwise due by the Purchasers; or
- 9.2 To cancel this Agreement, and in the event that the Purchaser has been granted vacant possession of the land, the Purchase shall immediately restore possession of the property to the Seller; or
- 9.3 Cancel this Agreement, and recover from the Purchaser any damages sustained by the Seller by virtue of the breach or cancellation.

11. In addition to the provisions of clause 8, in the event that either party (hereinafter called the breaching party) commits a material breach of any obligation or warranty owed or given to the other party (hereinafter called the aggrieved party) in terms of this agreement and remains in default despite delivery of a seven (7) days written notice from the aggrieved party to remedy the breach, then the aggrieved party shall have the right to-

- a) Either seek for specific performance and to claim payment of whatever amount is due together with interest at the prevailing Seller's minimum lending rate, which is published in the press from time to time.
- b) To cancel the agreement claim such damages as may have been caused by the breach, together with interest at the rate stipulated in 10(a) herein above, on the said damages from the date of breach And in addition the aggrieved party shall be entitled to any other remedy provided by law and to recover the legal practitioner and clients costs incurred in the legal process.”

The agreement provides for how material breaches of the agreement ought to be dealt with. *In casu*, the applicant claims that it is entitled to transfer of the property against payment of the purchase price. The applicant averred that post the execution of the agreement and specifically in January, 2019, it arranged for a meeting with the first respondents legal practitioners who were the conveyancers under the sale agreement. The applicant attached copy of an e-mail which it sent to the first respondent on 29 January 2019. The content of the e-mail reads:

“.....Please we want to arrange a meeting with you because we want to transact funds into your account on behalf of bank abc project”

The first respondents’ conveyancing legal practitioner Mr Mutero to whom the e-mail had been addressed by the respondents’ representative Jealous Marimudza responded on 31 January 2019 as follows:

“Dr Jealous
I am consulting the bank on the date and shall shortly revert”

No further correspondence appears to have taken place between the parties thereafter. The applicant averred in the founding affidavit that the conveyancer did not revert to it post the e-mail of 30 January 2019.

The applicant specifically averred as follows on para(s) 13 to 16 of the founding affidavit

- “13. Since then, Mr Mutero has not reverted to the Applicant and Applicant is unsure of the reason why First Respondent has developed cold feet on the transaction.
14. There is thus no lawful basis upon which Mr Mutero and First Respondent have not reverted to the Applicant as the parties entered into a valid agreement of sale.
15. Applicant is willing to meet its obligations in terms of the agreement of sale
16. Therefore, Applicant has approached this honourable court seeking an order to compel the First Respondent to transfer the properties against payment of the amount due on the contract.”

The first respondent averred that it took steps to terminate the agreement for breach. The applicant however denies that it was served with a notice of breach and termination. I do not consider that it is necessary to split hairs over whether or not there was delivery of the notice of breach and termination. It is not the first respondent which has applied to court for confirmation of termination of the sale agreement. It is the applicant which seeks to be granted an order of transfer of the property against payment of the purchase price.

The sale agreement provides that notice of material breach and a demand to rectify the breach within (7) seven days of delivery of such notice should be given by the party alleging material breach to the breaching party to remedy such breach. The first respondent averred that it gave such notice. The applicant has not averred that it placed the first respondent in *mora* or that it gave notice to the first respondent to remedy to breach it alleged against the first respondent of not proceeding with motions of transfer of the property. The question in this regard is whether or not the applicant would be entitled to the order of transfer which it seeks where it has not complied with the condition precedent that it ought to have first given notice of breach to the first respondent

as the seller before seeking an order of specific performance as envisaged in clause 11 of the agreement. The first respondent took up this point and expanded on it in the heads of argument.

It was perplexing to note from the answering affidavit and heads of argument filed on behalf of the applicant that it took issue with the validity of the purported termination of the agreement by the first respondent which it averred it was not served with. In its heads of argument, the applicant referred to various authorities to the effect that where a contract contains a cancellation clause the conditions set out therein must be complied with first for the cancellation to be valid. Reference was made to the judgments in *Central Africa Building Construction v Construction Resources Africa (Private) Limited* HH 122/12 and *Muranda v Todzaniso & Ors* 1998 (2) ZLR 235 (H) at 328-329. The corollary is however also true. Where a contract contains a specific performance clause and there are conditions to be fulfilled before the claim for specific performance may be made, the party which as in this case, the applicant, that seeks an order of specific must demonstrate that it complied with the terms precedent to claiming specific performance. It is a matter of logic and common sense that where a contract provides for steps to be followed before a certain relief may be claimed, the issue ceases to be an event but a process. *In casu*, the applicant did not plead that it gave the first respondent the requisite notice to remedy breach as provided for in the agreement. The filing of this application for that reason was premature and the relief sought cannot be granted. This must really be the end of the matter because no cause of action arises for the applicant to sue upon until the applicant has satisfied the conditions precedent to seek enforcement of the agreement.

A cause of action consists in a factual scenario which if proven to exist entitles one party to obtain relief from the court against another. A cause of action is therefore the entire set of facts upon which the relief claimed stands see *Peebles v Dairiboard (Pvt) Ltd* 1999(1) ZLR 41 (H). *In casu*, the giving of notice of breach in terms of the agreement was a condition to be fulfilled by the applicant first before seeking relief. If as is the case *in casu*, the applicant did not give the notice, the cause of action was not complete.

The determination of the above issue makes it unnecessary to deal with the rest of the issues raised by the parties. See *Gwaradzimba v CJ Rebron & Company (Proprietary) Limited* SC 12/2016 where GARWE JA (as then he was) stated at para 21 of the cyclostyled judgment:

“[21] In general I agree with the respondents’ submission that, in a case where a number of issues are raised, it is not always incumbent upon the court to deal with each and every issue raised in

argument by the parties. It is also correct that a court may well take the view that because of its finding on a particular case, it may not be necessary to deal with the remaining issues raised. However this is subject to the rider that the issue that is determined in these circumstances must be one capable of finally disposing of the matter”

The relief sought *in casu* is not one which the applicant can seek against the first respondent without alleging and demonstrating that the applicant first placed the first respondent in *mora* before instituting this application. The cause of action is not consummated unless the defending party is placed in *mora* on terms set out in the agreement.

The only other matter to consider concerns costs. Each party claimed costs. Costs must follow the event. No argument was raised by either party to persuade the court to depart from the general rule that costs follow the event. They are so ordered in this case.

In the result, the application be and is hereby dismissed with costs.

Madzingira & Nhokwara, applicant’s legal practitioners
Sawyer & Mkushi Legal Practitioners, respondent’s legal practitioners