

REPORTABLE (135)

DIVVYLAND INVESTMENTS (PRIVATE) LIMITED
v
DAVID CHIWEZA

SUPREME COURT OF ZIMBABWE
PATEL JA, GUVAVA JA & BHUNU JA
HARARE, 15 MAY 2020 & 5 NOVEMBER 2021

S. M. Hashiti, for the appellant

I. Musimbe, for the respondent

GUVAVA JA:

[1] This is an appeal against the whole judgment of the High Court which was handed down on 10 April 2019. The gripe of the appellant is that the court *a quo* dismissed its claim and granted an order in favour of the respondent's counter-claim.

BACKGROUND FACTS

[2] The facts of the matter which have a bearing on the dispute may be summarised in the following manner.

The appellant is a private limited company duly registered in accordance with the laws of Zimbabwe. The respondent is a private individual and resides at 12 Le Roux Drive, Hillside, Harare. On 19 July 2017, the appellant issued summons against the respondent and sought an order in the following terms:

- “(a) Ejectment forthwith of the defendant and all those claiming occupation through him from the property at number 12 Le Roux Drive, Hillside, Harare.
- (b) Payment of damages in the sum of US\$58 000.00 to plaintiff;
- (c) Payment of holding over damages in the amount of US\$700.00 per month calculated from the 01st June 2017 to date of eviction;
- (d) Costs of suit on the higher scale of legal practitioner and client.”

[3] The basis of the claim followed a purported breach of contract by the respondent. In its declaration to the summons the appellant averred that sometime in September 2009, the parties entered into a verbal agreement for the sale and purchase of a portion of immovable property known as number 12 Le Roux Drive, Harare (‘the property’). The sale was facilitated by an estate agents’ company known as Property Plus Realtors (Private) Limited which was acting on behalf of the appellant.

The agreement of sale stipulated that the respondent would pay the purchase price of US\$75 000 by paying a deposit of US\$15 000 upon agreement. The balance of US\$60 000 was to be paid at the rate of US\$5 000 per month for 12 consecutive months with interest on the purchase price being calculated at the rate of 1 per cent per month. The full purchase price was to be paid on or before 30 August 2010. The parties further agreed that the respondent would take immediate occupation of the property upon payment of the deposit.

[4] The appellant alleged that the respondent failed to pay the full instalments by the due date and as such breached the verbal agreement of sale. It was appellant’s evidence that the respondent failed to pay the sum of US\$39 100 which comprised the principal debt and interest. The appellant further stated that the respondent acknowledged in writing on 30 March 2017 that he had not paid the full purchase price.

- [5] On 17 May 2017 the appellant served the respondent with a notice to rectify its breach within 30 days. Despite the notice the respondent failed or neglected to comply. As a result of the respondent's breach the appellant cancelled the agreement of sale on 23 June 2017 and demanded vacant possession of the property.
- [6] Following the issuance of summons the respondent entered an appearance to defend. In his plea he averred that the agreed purchase price for the property was US\$68 000 and that he was to pay a deposit of US\$15 000 and thereafter instalments of US\$5 000 until the balance was paid in full. The respondent further averred that he paid the deposit and a further US\$37 000 and that the remaining balance as at 1 May 2010 was US\$16 000.
- [7] The respondent averred that he failed to continue with the payments as the appellant refused to come up with a written agreement of sale which would enable him to obtain a mortgage loan to pay for the outstanding balance for the property. The respondent further averred that both parties, as a compromise to their verbal agreement, agreed that upon payment of US\$300 by the respondent the appellant would draft the agreement of sale. The respondent paid the US\$300 but no agreement was drafted.
- [8] The respondent further stated that the appellant, without his knowledge and consent, sought to subdivide the property. In reaction to the subdivision, the respondent, through his legal practitioners, wrote a letter on 30 of March 2017 to the appellant informing it to refrain from the illegal subdivision and for it to provide a written agreement of sale. The respondent stated that the appellant did not comply with his notice. The appellant decided to give him notice to rectify a non-existent breach of the verbal agreement. It was the

respondent's averment that the notice by the appellant was a legal nullity and of no force and effect.

[9] The respondent thus denied the appellant's entire claim and consequently filed a counter-claim against the appellant seeking the following order:

“(a) An interdict restraining the Plaintiff from subdividing the property known as Stand 10830 Salisbury Township of Salisbury Township Lands Held Under Deed of Transfer Number 11900/2005.

(b) An order that the Plaintiff take all necessary steps to prepare an agreement of sale within 10 days of the granting of judgment reflecting the terms of the verbal agreement as set out in paragraphs 16 and 17 of this Declaration including the amount paid as of date and the balance outstanding in the sum of US\$16 000.00.

(c) Costs of suit on a Legal Practitioner and client scale.”

[10] In its plea to the counterclaim the appellant maintained that the agreement between the parties was for the sale and purchase of a portion of the property. The appellant further denied the payments and outstanding balance which the respondent purportedly made to it. The appellant also denied that it had an obligation to draw up an agreement of sale. It was appellant's argument that the agreement of sale did not have a term which provided that the balance of the purchase price would be paid through a bank loan.

[11] Following a Pre-Trial Conference before a Judge in chambers, the parties entered into a joint pre-trial conference minute which read as follows:

“ISSUES

1. What were the initial and later compromise terms of the agreement?
2. Whether or not the defendant breached any of the terms of the agreement.
3. Whether or not the plaintiff should not be interdicted from subdividing the property?

ONUS

1. On both parties in respect of issue number 1.
2. On the plaintiff in respect of issue 2.
3. On defendant in respect of issue 3.

ADMISSIONS

1. Plaintiff admits to receiving US\$300 for the purposes of drafting an agreement of sale.

2. Defendant is presently in possession of the property.”

EVIDENCE BEFORE THE COURT A QUO

[12] At the trial, the appellant led evidence through a single witness, one Brian Machengo (Machengo), a sales manager at Property Plus Realtors (Private) Limited. Machengo testified that the advertisement of the property was published through The Herald newspaper. It did not indicate that only a portion of the property was being sold. It simply made reference to ‘one acre of panoramic views’.

He further stated that he was given a mandate by the appellant to sell the property for US\$90 000 but published the advertisement with an offer price of \$70 000. His mandate was to sell land with a residential property measuring plus or minus 1500 square meters. It was part of the whole property that comprised 12 Le Roux Drive. The respondent was one of the persons who responded to the advertisement and made an offer to purchase the property for US\$68 000. This offer was rejected by the appellant.

[13] He could however not explain how the purchase price changed from US\$90 000 to US\$70 000 and subsequently to US\$75 000. It was his evidence that as the agreement was verbal there was no paper trail explaining what had taken place.

[14] Machengo further accepted that at the time when the sale was concluded there was no subdivision permit as the permit was only granted on 10 February 2015. He further accepted that the respondent paid about US\$52 000 towards the purchase of the property and that he paid US\$300 for the drafting of an agreement of sale.

[15] He confirmed that the respondent filled in an offer to purchase form. He also highlighted that the form did not make any reference to the respondent accessing mortgage finance to pay off the purchase price. He denied that he was obliged to give the respondent a written agreement. He further stated that the appellant was within his rights to subdivide the property as he had only sold a portion of it to the respondent.

[16] The respondent testified on his own behalf and led evidence from two other witnesses. The respondent testified that he saw an advert for the property which had a purchase price of US\$70 000. He made an offer for US\$68 000 on an Offer Form provided to him by Machengo.

He indicated that it was never mentioned to him that only a portion of the property was being sold and that from the description of the property on the advertisement he believed he was purchasing the whole property. He denied that the purchase price of the property was agreed as US\$75 000 as alleged by the appellant.

[17] The respondent admitted that he had not paid the full purchase price for the property. He attributed his failure to meet the terms of the agreement to the fact that his company was facing economic hardships and that he failed to acquire a bank loan as the appellant had refused to give him a written agreement of sale. He explained that since he failed to get a written agreement he was unable to obtain a loan to offset the outstanding balance.

[18] The respondent testified that in 2010 he met Mr Van Hoogstraten, whom he believed to be the seller, for the first time who informed him that he never signs written contracts

in his business dealings. He then formed the opinion that he was dealing with “crookey dodgy people” and decided not to pay the balance of the purchase price.

[19] He testified that he later received a report that there were people subdividing the property. He wrote to the appellant protesting the subdivision as he believed he had purchased the whole property. When he did not get a response he made a report to the police. Following the report to the police he then received a letter informing him that he was in breach of the agreement. The respondent denied that he owed the sum of US\$58 000 as damages for rentals calculated at the rate of US\$700 per month.

[20] In 2014 he again met Mr Van Hoogstraten and this time he agreed to have a written agreement of sale, provided the money for drafting such agreement was paid. It was on this basis that he paid the \$300 for drafting the agreement of sale. However, in spite of paying the \$300, no agreement was drafted by the appellant.

[21] The evidence of Patrick Mapfumo, the respondent’s second witness was admitted with the consent of both parties. Mapfumo’s evidence as stated in the respondent’s summary of evidence confirmed that, in 2014, the witness and his wife had gone with the respondent to see one Mr. Nicholas Van Hoogstraten along Mazowe Road. Their party also included Machengo. It was Mapfumo’s evidence that at the meeting the parties agreed that an agreement of sale be drawn up upon payment of US\$300 (being made) by the respondent for drafting the agreement.

[22] The respondent’s third witness was Patrick Nyamugama, a registered estate agent, who appeared to give expert evidence in support of the respondent’s case. Nyamugama

testified that around the year 2009 the property in dispute would have been valued at about US\$70 000 – US\$80 000. He also stated that if the property was to be subdivided the value of the property would be about US\$50 000.

[23] At the conclusion of the trial, the court *a quo* found that the respondent purchased the entire property and not a subdivision as alleged by the appellant.

The court disbelieved the evidence of Machengo and found him to be an evasive witness. The court also found that Machengo made a number of concessions in favor of the respondent. The court *a quo* thus found that the appellant had failed to prove its claim. It noted that there were gaps in the evidence given by Machengo and that the appellant ought to have called its directors. The court further noted that as the subdivision of the property had already been granted it could not make any order interdicting the operation of the subdivision permit.

However, the court found that the subdivision permit number SD/CR/15/14 dated February 2015 was null and void as it had been granted six years after the whole property had been sold to the respondent.

[24] In the result the court made the following order:

1. “The plaintiff’s claim is dismissed.
2. The defendant’s counter-claim is granted.
3. The plaintiff shall take all the necessary steps to prepare an agreement of sale within ten (10) days of the handing down of this judgment reflecting the terms of the verbal agreement entered into on 30 August 2009 including the following:
 - 3.1 that plaintiff sold to the defendant certain piece of land situate in the district of Salisbury called stand 10830 Salisbury Township of Salisbury Township Lands measuring 3033 square metres held under Deed of Transfer number 11900/2005 in favour of Divvyland Investments (Private) Limited.

- 3.2 that the agreed purchase price for the immovable property was the sum of US\$68 000 (sixty eight thousand United States dollars).
- 3.3 that the defendant paid a deposit in the sum of US\$15 000 (fifteen thousand United States dollars) on 04 September 2009.
- 3.4 that the defendant has paid a total of US\$56 900 (fifty six thousand nine hundred United States dollars) to date towards liquidating the purchase price inclusive of interest.
- 3.5 that the defendant shall pay the outstanding balance of \$14 384-01 (fourteen thousand three hundred and eighty four United States dollars and one cent) through a bank loan.
4. The plaintiff shall pay the defendant's costs of suit in respect of both the main claim and the counter-claim on the legal practitioner and client scale."

[25] Aggrieved by the judgment of the court *a quo* the appellant noted the present appeal on the following grounds:

1. The court *a quo* erred and misdirected itself in granting relief not sought by the parties and in consequence by creating a non-existing contract for the parties.
2. The court *a quo* erred and misdirected itself in setting aside a valid subdivision permit when no such relief had been sought before it.
3. The court *a quo* erred and misdirected itself in failing to find that once respondent was in willful default/breach for a period in excess of five years and contrary to the agreement the appellant was entitled to cancellation of the agreement and to the consequential relief of eviction and holding over damages.
4. Furthermore the court *a quo* erred in its failure to find that the absence of a written agreement is no bar to payment of the purchase price and that respondent was not absolved from performing his side of the agreement as he could still tender into court or have made payment as he had previously done.

5. The court *a quo* further erred and misdirected itself in failing to find that an advertisement is an invitation to treat and does not create a binding contract. Furthermore, it misdirected itself in failing to find per the evidence led that the respondent's offer had not been accepted by the appellant.
6. The court *a quo* further erred in imposing a contractual obligation of loan/mortgage financing which did not form part of the agreement between the parties and which did not exist at the time of contracting as per the evidence led.
7. The court *a quo* further erred and misdirected itself in failing to find that the admissions made by respondent entitled appellant to succeed on its case and have the counterclaim dismissed. These were:
 - a) The property is registered in the name of the appellant who still possesses all rights of ownership in terms of the title deed.
 - b) Respondent had not paid the full purchase price, whether for the half portion or for the full portion. It doesn't matter which portion he has not paid and persists in breach beyond the contracted time period (*sic*).
 - c) The appellant like any other party had a right to cancel the agreement and claim eviction and holding over damages consequent to cancellation.
8. The court *a quo* further erred and misdirected itself in disregarding the uncontroverted evidence that the land in issue was a half-acre portion as opposed to a full acre regard being had to the mandate to sell letter and to the advertisement placed by appellant.
9. The court *a quo* further erred and misdirected itself in failing to find that the agreement to sell a portion of land absent a subdivision permit was in any event unlawful and could consequently not be enforced.

The appellant's grounds of appeal in my view raise the following issues for determination:-

1. Whether or not the court *a quo* granted relief not sought by either of the parties.
2. Whether or not the court *a quo* erred in dismissing the appellant's claim.
3. Whether or not the court *a quo* erred in granting the respondent's counterclaim.

I will proceed to deal with these issues *seriatim*.

APPELLANTS SUBMISSIONS BEFORE THIS COURT

[26] Counsel for the appellant, Mr. *Hashiti*, argued that the court *a quo* fell into error when it granted relief which was not sought by either of the parties. It was counsel's submission that the court *a quo*'s finding that the subdivision permit was null and void was made in error as the issue of its legal effect was never an issue for determination before the court. Counsel argued that the court found that it could not interdict the operation of the subdivision permit as the permit had already been granted and yet the court *a quo* went on to grant the respondent's counterclaim including the part which sought to interdict the appellant from subdividing the property.

[27] It was also counsel's submission that para 3 of the order granted by the court *a quo* was made in error as the court enforced a non-existent agreement made on 30 August 2009 when the verbal agreement was in September 2009.

[28] The appellant submitted that the court *a quo* erred in granting a computation of figures which were to be included in the agreement of sale. In support of the point counsel argued that the court misdirected itself when it ordered that the respondent was to pay US\$14

384.01 through a bank loan when the respondent by his own admission during trial maintained that he owed US\$16 000.

[29] In relation to the issue of whether or not the respondent proved his counterclaim, counsel for the appellant argued that the respondent by his own admission stated that in a period of over nine years he failed to pay the full purchase price of the property. He thus had no valid claim to the property which remained under the ownership and title of the appellant.

[30] It was appellant's further argument that the respondent's claim that he was to obtain a bank loan to pay off the outstanding amount was never agreed to as between the parties and therefore the court *a quo* should not have granted an order allowing the respondent to pay the outstanding balance through a bank loan.

[31] Counsel concluded by submitting that it was a basic principle of law that where a person occupies another person's property he or she must pay rent. Counsel thus argued that the respondent, having been in occupation of the property for over nine years without being able to satisfy the purchase price, was liable to pay the appellant damages of US\$58 000 and holding over damages of US\$700 per month calculated from 1 June 2017 to the date of eviction.

RESPONDENT'S SUBMISSIONS BEFORE THIS COURT

[32] *Per contra*, counsel for the respondent, Mr. *Musimbe*, submitted that the court *a quo* did not misdirect itself in its findings as it dealt with all the issues which were raised in the pre-trial conference minutes. Counsel submitted that the court had to resolve whether there was a breach by the respondent. Counsel further submitted that the events

that led to the appellant issuing summons only arose after the respondent wrote to it informing it to stop the subdivision of the property as this was a breach of the agreement of sale.

[33] It was counsel's argument that the court correctly believed the respondent's version of how the purchase price was paid. He also submitted that the respondent made efforts to pay off the outstanding balance by paying the US\$300 for a written contract which would help him secure a loan.

[34] The appellant's witness, Machengo, made concessions during the trial which destroyed the appellant's claim. Counsel thus argued that the appellant's case was full of improbabilities and inconsistencies. He therefore submitted that the judgment of the court *a quo* was unassailable and prayed for the dismissal of the appeal.

APPLICATION OF THE LAW

Whether or not the court *a quo* granted relief not sought by either of the parties.

[35] Before the court *a quo*, the appellant sought an order for the eviction of the respondent and all those claiming occupation through him, damages in the sum of US\$58 000, holding over damages at the rate of US\$700 per month calculated from 1 June 2017 to the date of eviction and costs of suit on a higher scale. The respondent in his counterclaim sought an interdict restraining the appellant from subdividing the property and an order that the appellant take all necessary steps to prepare a written agreement of sale which would reflect the terms of the verbal contract and the outstanding balance of US\$16 000.

[36] The appellant's claim was dismissed by the court *a quo* and the respondent's counterclaim granted. The question of whether or not the court granted competent relief sought by either of the parties shall thus be determined with regard to the order granted in favour of the respondent only.

[37] The court *a quo* found that it could not grant an interdict against the subdivision permit as the permit had already been issued. The court also found that the subdivision permit was null and void. The court upon making this finding thereafter proceeded to grant the respondent's counterclaim in its entirety. In my view this was the first error made by the court *a quo*.

[38] As if this was not enough the court went ahead and ordered that the appellant to facilitate the writing of an agreement of sale between the parties. The court *a quo* laid out the terms to be included in the agreement of sale. A close reading of the judgment of the court shows a marked discrepancy between what was prayed for by the respondent and what was eventually granted.

[39] Firstly, it should be noted that it is an accepted principle of our law that it is not open to a court to rewrite terms of a contract for the parties. A court cannot infer or imply terms of a contract between parties but must simply interpret the terms of the contract in the event that a dispute arises. In *Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403C-D it was reiterated by the Court that:

“In principle, it is not open to the courts to re-write a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted,...”

Further in *Wells v Southern African Alumenite Co.* 1927 AD 69 at 73 Innes J expressed that:

“If there is one thing which more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by the courts.”

[40] Paragraph 3 of the order of the court *a quo* clearly shows that the court fell into error in failing to appreciate the sacrosanct nature of the contract which existed between the parties. Even if it was clear that the agreement between the parties was marred by different versions of events, the court could not dictate the terms of the agreement as the court was not party to the agreement nor was it present when the verbal agreement was concluded.

[41] To further compound the error on the order the court wrongly computed the dates when the agreement was made. Both parties agreed that the agreement was made in September 2009 and not 30 August 2009 as stated by the court. The court went on to compute figures for the parties, which figures were disputed by the appellant and which were equally not clearly proved by the respondent.

[42] The court *a quo* ordered that the agreement be written to reflect that the respondent paid a deposit of US\$15 000 on 4 September 2009, that he paid a total of US\$56 900 to date towards the purchase price plus interest and that the outstanding balance to be paid by the respondent was US\$14 384.01 to be paid through a bank loan. The court however failed to take cognizance of the fact that in making his counterclaim the respondent stated the terms of the contract between the parties. Under para 17 of his claim he averred that he paid a deposit of US\$15 000, paid instalments of US\$37 000 for a period between 30 September 2009 to 1 May 2010 and that a balance of US\$16 000 remained.

[43] The court *a quo* could not draft a new contract for the parties and dictate new terms. The terms in the order were not the terms admitted and set out by the respondent in making the counterclaim. The court did not give justification for arriving at the amount it stated as US\$56 900 (being the purchase price and interest) as the respondent himself never made reference to the amount of interest he paid in making the purchase price.

The court further arrived at the outstanding amount of US\$14 384.01 without showing how such amount was calculated and yet the respondent had made an admission that the outstanding balance was US\$16 000. It can thus be deduced that the court misdirected itself by purporting to lay out terms of an agreement it was not a party to.

[44] Secondly, the court *a quo* granted the respondent's counterclaim despite finding that it could not grant the interdict sought because the subdivision permit had already been granted. The court also went on to find that the subdivision permit was null and void. A reading of the record shows that neither of the parties sought a declaration on the legality of the subdivision permit. Further the record shows that the respondent did not motivate his claim by satisfying the requirements for an interdict but the court still made a finding on the interdict sought.

[45] A court must determine a matter based on the papers and evidence placed before it by the parties. It cannot go on a frolic of its own. This principle was stated in *Nzara and Ors v Kashumba N.O. and Ors* SC 18/18 at page 13 of the cyclostyled judgment wherein the Court held that:

“The function of a court is to determine the dispute placed before it by the parties through their pleadings, evidence and submissions. The pleadings include the prayers of the parties through which they seek specified orders from the court. This position has become settled in our law. Each party places before the court a prayer he or she

wants the court to grant in its favour. The Rules of court require that such an order be specified in the prayer and the draft order.

These requirements of procedural law seek to ensure that the court is merely determining issues placed before it by the parties and not going on a frolic of its own. The court must always be seen to be impartial and applying the law to facts presented to it by the parties in determining the parties' issues."

[46] Also, in *Proton Bakery (Pvt) Ltd v Takaendesa* 2005 (1) ZLR 60 (S) at page 62E-F, Gwaunza JA (as she then was) noted the following:

"The appellant argues, in light of all this, that the action of the court *a quo* in reaching a material decision on its own, amounted to gross irregularity justifying interference by this court on the principles that have now become trite.

I am, for the reasons outlined below, persuaded by this argument...

The misdirection on the part of the court *a quo* is left in no doubt. It is in my view, so serious as to leave this Court with no option but to interfere with the determination of the lower court."

[47] The court *a quo* thus erred and misdirected itself by *mero motu* granting relief which had not been sought by the respondent in his counterclaim. Such misdirection warrants interference by this Court as the court clearly went on a frolic of its own.

Whether or not the court *a quo* erred in dismissing the appellant's claim.

[48] The court *a quo* dismissed the appellant's claim on the basis that its case:

"... was riddled with inadequacies of evidence, manifestly illogical, pregnant with concessions favourable to the defendant, diametrically opposed to the documentary evidence, against the probabilities, wanting in credibility in respect of the sole witness called by the plaintiff and quite simply hopeless. In a nutshell, this trial was a sheer waste of the court's time."

[49] The court found that the appellant failed to prove the claim for eviction of the respondent from the property as well as the claim for damages and holding over damages. It is imperative to note that the appellant as well as the respondent in making

their respective claims had to prove their cases on a balance of probabilities (see *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (SC)).

[50] In its claim the appellant was obliged to prove, firstly, that it had title over the property and had a right to seek the eviction of the respondent from the property. The court *a quo* in assessing the appellant's evidence was of the view that its witness was not truthful. It believed the respondent and came to the conclusion that the cancellation of the agreement by the appellant was null and void and of no effect. The court further concluded that by subdividing the property the appellant wanted to resell the property behind the respondent's back and to prevent the respondent from enjoying his rights to the property.

[51] The court *a quo*, however, failed to appreciate one important fact. It was not in dispute that the respondent was in breach of the verbal agreement of sale. As at the time when the matter was heard *a quo* and to date, the respondent is in continued breach of the agreement of sale as he has not paid the full purchase price for the property. In my view, questions around whether or not the property was sold in its entirety, whether or not the property was sold for US\$68 000 or US\$75 000 and whether or not the subdivision permit is legal and affects the rights of the respondent on the property could only be answered after the respondent had remedied his breach.

[52] It was an agreed term between the parties that the full purchase price would be paid by the respondent on or before 30 August 2010. It is not in dispute that the respondent failed to pay the outstanding balance to the appellant for a period of over nine years. The appellant gave notice of the breach and cancelled the agreement of sale. At the trial

the respondent testified that he failed to pay the outstanding balance due to the failure by the appellant to draft a written agreement which he could use to obtain a mortgage from the bank. Under cross examination the respondent changed positions and admitted that he did not pay the outstanding balance because he saw that he was dealing with: “crookey dodgy people who just wanted me to finish pay off then they say they did not sell...”

[53] The respondent further admitted during cross examination that the appellant had a right to terminate the agreement in the event of a breach. For the sake of completeness I will quote the relevant evidence before the court *a quo*:

“Q. Now I want you to look at the undertaking you made under the method of payment, you wrote “I undertake to pay the full amount not later than 30 August 2020, do you see that? A. Correct

Q. “Failing which the seller may proceed to terminate the agreement of sale”, do you see that? A. Correct

Q. Did you make full payment of any amount by 30 August 2010? A. I did not.”

[54] Having been admitted and established that the respondent failed to pay the full purchase price by the agreed date, the court *a quo* ought to have been alive to the fact that the appellant remained with a valid title over the property and had the right to cancel the agreement when there was a breach. The court *a quo* fell into error by clouding issues and failed to determine the issue that was squarely before it. The issue of the appellant failing to provide a written agreement after the respondent paid the drafting fee so as to enable him to obtain a mortgage loan was never a term of the original agreement.

- [55] It is a fundamental principle of every contract that both parties will duly carry out their respective obligations (see *Blumo Trading (Private) Limited v Nelmah Mining Company (Private) and Another* HH 39/11). In the event that a party fails to carry out its obligation this will amount to a breach of the contract or agreement. In R. H. Christie, *Business Law in Zimbabwe (Juta & Co. Ltd)* at page 119 the learned author states that:
- “Breach may take a number of forms other than *mora*, and whether a breach has been committed will be decided by comparing what the debtor has done or not done with what he ought to have done on a proper interpretation of the contract... Once it is decided that a breach has been committed it is necessary to decide whether the creditor is entitled to the most drastic remedy of cancellation or whether he must be content with one or more of the other available remedies.”
- [56] The admission by the respondent that he failed to pay the full purchase price amounted to a breach of the agreement of sale which gave the respondent the right to cancel the agreement between the parties. As such, the respondent cannot continue to have occupation of the property while he is in breach of the agreement of sale. The ownership rights of the appellant must be protected. In the case of *Alspite Investment (Pvt) Ltd v Westerhoff* 2009 (2) ZLR 236 it was stated that there are no equities in an application for a *rei vindicatio* as it is a principle of our law that an owner as a general rule cannot be deprived of his property against his will.
- [57] With respect to the appellant’s claim for damages in the sum of US\$58 800 calculated at the rate of US\$700 per month as reasonable rental income from the date of occupation to date of summons and the claim for holding over damages in the sum of US\$700 calculated from 1 August 2017 to the date of eviction, it is our view that these claims were not substantiated or proved at trial.

Whether or not the court *a quo* erred in granting the respondent's counterclaim.

[58] As discussed above, the respondent did not motivate or satisfy the requirements of an interdict. The court in turn found that it could not grant the interdict sought although it went on to make a contrary finding that the permit was null and void.

[59] The respondent was equally in breach of the agreement of sale and as such could not be granted the relief he sought for the appellant to provide a written agreement of sale, as the appellant had already exercised its right to cancel the agreement of sale. There was therefore no basis upon which the court could grant the respondent's claim as it did.

[60] The court made factual findings in arriving at the decision to allow the respondent's claim. It is a settled principle that this Court will not easily interfere with factual findings made by a lower court unless the findings are grossly unreasonable. (See *ZINWA v Mwoyounotsva* 2015 (1) ZLR 935 (S), *Hama v NRZ* 1996(1) ZLR 664 (S), *Reserve Bank of Zimbabwe v Corrine Granger and Another* SC 34/01). I find that the findings of the court *a quo* in granting the respondent's claim when he was in breach of the agreement of sale were so unreasonable as to warrant interference by this Court.

DISPOSITION

[61] The court *a quo* misdirected itself in granting the respondent's claim in reconvention when he was in breach of the agreement of sale. The court also misdirected itself when it failed to realize that as the respondent had failed to fulfil the obligations under the agreement of sale the appellant remained the title holder of the property and could exercise its right to cancel the contract on the basis of the breach and recover possession

of the said property. The appeal will thus partially succeed in this regard. The court, however, correctly found that the appellant failed to prove its claim for damages and holding over damages as the respondent was not a tenant and was therefore not expected to pay rentals.

[62] With regard to costs the appellant has been partially successful and costs must follow the cause.

[63] In the result, it is ordered as follows:

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

- “1. The plaintiff’s claim for eviction of the respondent and all those claiming occupation through him from number 12 Le Roux Drive, Hillside, Harare is granted.
2. The plaintiff’s claim for damages in the sum of US\$58 800 and holding over damages be and is hereby dismissed.
3. The defendant’s counterclaim is hereby dismissed.
4. There shall be no order as to costs.”

PATEL JA I agree

BHUNU JA I agree

Mushoriwa Pasi Corporate Attorneys, appellant’s legal practitioners

IEG Musimbe and Partners, respondent’s legal practitioners