

GODFREY NYAMUTAMBO
versus
CITY COUNCIL OF KWEKWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 27 MARCH 2017 AND 13 APRIL 2017

Opposed matter

T Zishiri for the applicant
L Nkomo for the respondent

MOYO J: This is a court application for summary judgment wherein the applicant seeks the following order:

- “a) Judgment be and is hereby granted against respondent in the sum of one hundred and sixty two thousand, two hundred and ten dollars only (\$162210-00) together with interest thereon at the prescribed rate with effect from the date of summons to date of payment in full.
- b) Respondent to pay costs of suit at an attorney and client scale.”

At the hearing of this matter, I dismissed the application and stated that my detailed reasons would follow. Here are the reasons.

The facts of the matter are that sometime in May 2005, the applicant bought from respondent stand number 2795 LCK Township measuring 10881, 14m². It was a term of the agreement that plaintiff would pay a purchase price of ZWD811000-00. Plaintiff paid the full purchase price. It later turned out that the same stand had been sold by respondent to a third party prior to it being sold to applicant. The parties were engaged in protracted negotiations wherein respondent undertook to provide applicant with a replacement stand. Respondent then offered applicant other stands of similar size and value so that it would perform the contract. In a letter dated 19 January 2016, respondent offered applicant three adjacent stands namely stand number 2918, 2919, and 2920 measuring in total 10676m² it then offered the applicant a discount in rates

to make up for the shortfall in the size of the stands as the current stands were less in size by 138m² compared to the initial stand. The letter reads on second paragraph thereof,

“If the above offer is acceptable, you are required to come and sign a memorandum of agreement to bring finality to this matter.”

On 11 February 2016, applicants’ lawyers replied by email and stated that their client (applicant) advised that that he was not satisfied with the nature of the stands offered and will therefore not take any of them. On 12 February 2016, respondent’s lawyers wrote to applicant’s lawyers requesting details as to the unsuitability of the stands in question.

On 17 February 2016 applicant’s lawyers wrote to advise that their client’s instructions were that the pieces of land were not accessible and were too far from the location of other industries.

On 15 March 2016, respondent’s lawyers wrote to advise that respondent had identified other pieces of land and that arrangements would be made in due course for applicant to visit the said pieces of land.

It is not clear on the papers what then became of this last offer. A look at the summons would show that plaintiff’s main claim is the replacement value of the stand and the alternative claim is that of allocation of a stand. There is clearly a question of bad drafting here, for plaintiff’s cause of action is based on contract. Plaintiff does not allege cancellation of the said contract. He however, seeks damages in the form of the replacement value of the stand without first pleading cancellation of the contract. For if the contract has not been cancelled, then plaintiff should seek enforcement or alternatively that plaintiff be paid damages for breach of contract if defendant does not comply with the order for specific performance. Plaintiff’s cause of action if based on breach of contract can only be damages where plaintiff alleges that it has since cancelled the contract it had with the defendant. Plaintiff cannot seek damages for breach of contract as main relief and at the same time claim an alternative replacement stand. Refer to the case of *Agribank Zim Ltd v Nickstate Investments* 2010 (1) ZLR 419.

In the claim for summary judgment applicant has abandoned the alternative relief as obviously you cannot seek specific performance via summary judgment. However, plaintiff

seeks damages for breach of contract without first verifying the cause of action and making an averment that the contract has been cancelled. From plaintiff's own summons, the contract has not been cancelled as plaintiff still pleads allocation of another stand. Plaintiff pleads allocation of an alternative stand and it would appear respondent has indeed made attempts to perform its part of the deal but the parties have not managed to agree on the alternative stand. The real problem with applicant's papers is that firstly, its cause of action is not clear as per the summons.

Secondly, the founding affidavit does not verify the cause of action so that this court is clearly apprised of whether plaintiff's cause of action is breach followed by cancellation and a claim of damages or its breach followed by an intention to compel defendant to perform failing which damages would be claimed as an alternative. These two points are critical. For a plaintiff to succeed in an application for summary judgment their claim must be unassailable, a summons that does not clearly plead a plaintiff's cause of action so much so that issues of law can be taken on it, cannot be held to be an unassailable claim.

In the case of *Pitchford Investments Pvt Ltd v Muzari* 2005 (1) ZLR 1 (H) MAKARAU J as she then was held thus:

“Although the emphasis in the rules of court governing summary judgment is on the defences proffered by the defendant, the rules must be read as requiring the plaintiff's claim itself to be unanswerable and based on a clear cause of action. Where plaintiff's claim on its own does not reveal a clear and competent cause of action, then even if no formal exception has been filed by the defendant to the claim, the court may not grant summary judgment on such a claim.”

The other problem with this application is that summary judgment is being sought on a damages claim since in the applicant has abandoned the specific performance aspect. Plaintiff purchased the stand in 2005 at a purchase price of ZWD \$811000-00. He now seeks judgment in the sum of \$162210-00 USD. Even if plaintiff's summons had been properly drafted, the disparities in the currencies and the appropriate values require that the matter goes to trial and the issue of the quantum of damages due to plaintiff be dealt with.

In the summons plaintiff avers that despite demand defendant has failed to pay plaintiff the current value of the property. Plaintiff does not allege in the summons that defendant has failed to allocate him an alternative stand. Surprisingly, plaintiff goes on to claim that

“Alternatively, plaintiff claims re-allocation and transfer to him of either residential, industrial, or commercial stand or combination.”

This, it is not averred in the summons that defendant has failed to do and in fact correspondence shows that plaintiff has indeed been offered stands in terms of the alternative relief but he has not taken them up. Plaintiff can not approach this caught to seek relief that Defendant has already tendered.

In plaintiff’s memorandum to the defendant’s lawyers, it is stated that the stand is inaccessible and far from other stands, but *Mr T Zishiri in his oral address* submitted upon being asked by the court, what became of defendant’s offer, that, the stands were offered to plaintiff but were never transferred to him. The letter dated 16 January 2016, however invites plaintiff to come and sign a memorandum of agreement in relation to the offered stands. It would appear he did not attend as he refused that offer. However, the claim that the stands are inaccessible and far from other stands does not hold any water for the simple reason that the relief he then seeks in court, does not qualify the kind of stands he should be given so much so that if defendant allocates and transfers to plaintiff a stand, the order of this court as sought in the summons would be satisfied. This means that the plaintiff is seeking relief in this court with no basis whatsoever as defendant has in fact offered plaintiff the same relief. Conspicuously absent from the averments in the summons as already noted is a claim that defendant has failed or neglected to allocate plaintiff an alternative stand.

As if the confusion surrounding plaintiff’s case is not enough, counsel for the plaintiff further stated in his heads of argument that the agreement of sale between the parties was a nullity and that plaintiff cannot seek to enforce a nullity as anything done contrary to the direct prohibition of the law is a nullity. If plaintiff’s counsel is of the view that this agreement is a nullity, then nothing would flow from it, including a claim for damages. Plaintiff’s counsel further submitted that the plaintiff’s claim is based on unjust enrichment not on breach of contract. This further complicates plaintiff’s case. The summons is badly drafted so much so that the cause of action is not clearly stated therein and plaintiff’s counsel also comes up with other strange arguments on the cause of action, throwing plaintiff’s whole case into disarray.

My conclusion is that:

- 1) Plaintiff's case is not properly pleaded so as to make it an unassailable claim.
- 2) Plaintiff's cause of action is not verified in the founding affidavit.
- 3) There is no allegation in the summons that defendant failed to perform as per the alternative claim in therein.
- 4) The quantum of damages for breach of contract, even if plaintiff had a properly pleaded claim, and damages would ensue, cannot be disposed of by way of a summary judgment, especially considering that plaintiff paid in Zimbabwe dollars and now seeks to be compensated in United States Dollars. I do not hold the view that such is a matter that can be dealt with summarily. I do not hold the view that with these factors glaringly present, this court can hold that plaintiff's claim is unassailable and therefore the door should be shut on the defendant.

I awarded costs at a higher scale for the reasons that plaintiff's case was not only badly drafted, but it was also badly presented. An essential averment is missing on defendant's failure to perform on the alternative relief sought. An essential averment is also missing on the cancellation of the contract leading to a claim for damages. I held the view that this whole matter is an abuse of court process and was not done with due diligence, good faith and a quest to obtain justice. I say so for plaintiff has not pleaded failure by defendant to perform the relief sought in the alternative, and yet there is correspondence to show that defendant has indeed attempted to provide the relief sought as an alternative in the summons.

It is for the aforestated reasons that I dismissed the application with costs at a higher scale.

Messrs Garikayi and Company, applicant's legal practitioners
Mutatu and Partners, C/o Dube-Tachiona & Tsvangirai, respondent's legal practitioners