

GROWNET INVESTMENTS (PRIVATE) LIMITED
versus
RUWA LOCAL BOARD
and
THE MESSENGER OF COURT HARARE

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 22 September 2011 & 26 October 2011

Mr *Makuwaza*, for the applicant
Mr *Magwaliba*, for the first respondent

MTSHIYA J: The applicant seeks the relief of specific performance. The order sought reads as follows:

“IT IS ORDERED THAT:-

1. First and second respondents be and are hereby ordered to sign all necessary papers to effect transfer of Stand Number 653 Ruwa Township of Stand 2016 Ruwa Township to applicant within 14 days of service of this Order.
2. In the event that first and second respondents fail to comply with the Order in paragraph 1 above, the Deputy Sheriff be and is hereby authorised to sign all the necessary papers to effect transfer of Stand number 643 Ruwa Township of Stand Number 2016 Ruwa Township to applicant on behalf of first and second respondents.
3. First and second respondents shall jointly pay the cost of this application, the one paying the other to be absolved.

Alternatively, **IT IS ORDERED THAT:**

1. The first respondent be and is hereby ordered to allocate another stand to the applicant measuring 2000 square metres within 14 days of service of this order.
2. The first respondent be and is hereby ordered to effect cession of the allocated Stand in paragraph 1 above to the applicant within 7 days of such allocation.
3. First and second respondents shall jointly pay the costs of this application, the one paying the other to be absolved.”

The facts of the case are well captured in the first respondent’s Heads of Argument and for the sake of clarity I shall reproduce them hereunder as given. The respondent outlines the facts as follows:-

- “1. The 1st respondent was awarded judgment by the Magistrate Court in its

favour against Ranganai Chinhamo on the 10th of September 2007 in respect of rates and service fees, for the sum of ZW\$2 488 479.39.

2. On the 18th of February a writ of execution was issued against stand number 653 Ruwa township measuring 2 000 square metres as it alleged to be property of the aforementioned judgment debtor.
3. The immovable property was sold by public auction by the messenger of court to the applicant on the 30th of May 2008. Subsequent to the sale in execution the second respondent instructed Messrs Wickwar and Chitiyo legal practitioners to effect transfer to the 1st respondent's affidavit.
4. It was after the purported contract of sale, that Messrs Wickwar and Chitiyo soon after conducting a deeds search before transferring the property to the applicant, discovered that Ranganai Chinhamo (judgment debtor) had already transferred the immovable property to TA Holdings Limited in 2004.
5. The applicant's prayer is to compel the 1st respondent to transfer the property belonging to TA Holdings Limited (a third party) into its name or in the alternative that 1st respondent should allocate to it land of equivalent value to substitute the land in dispute."

The above outline of facts clearly reveals that right from the beginning there was nothing to be auctioned under the writ of execution and events that later unfolded also confirmed that position.

In addressing the issue of specific performance, the applicant correctly quotes INNES J from *Farmers Coop Society Reg. vs Berry* 1912 AD 343 at p 350 where he says:-

"prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, so far as it is possible, a performance of his undertaking in terms of the contract. As remarked by Kotze CJ in *Thompson vs Pullinger* (1894) 1 QR at page 301. "the right of a plaintiff to the specific performance of a contract where the defendant is in a contract where the defendant is in a position to do so is beyond all". It is true that Courts will exercise discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money..." (My own underlining)

The principles of law quoted above also appear in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR21 (H) in which ROBINSON J, as he then was, adopted the same approach with respect to the issue of specific performance.

The above is the general law relating to specific performance. In *casu* there was never anything to be auctioned. I read the law as saying an order for specific performance shall not “be issued where it is impossible for the defendant to comply”. This, in my view, is the position *in casu*. The property meant for public auction belonged to T.A. Holdings (Pvt) Ltd. It did not belong to Rangai Chinhamo and still does not belong to him.

A proper use of the discretion given to the court would, in the circumstances of this case, be to deny specific performance in any form, including the alternative prayed for. There is no evidence to the fact that the respondent is owner of any stands that can be used to fill in the gap. I am therefore unable to grant the relief sought.

- a) The application is dismissed; and
- b) Each party shall bear its own costs.

Sinyoro & Partners, applicant’s legal practitioners
Messrs Magwaliba & Kwirira, 1st respondent’s legal practitioners