

JANE BESTER PHIRI
versus
PATSON NAWASHA

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 23 November, 2011

Opposed Application

D. Dhumbura, for the applicant
S. Mahuni, for the respondent

MUTEMA J: The dispute *in casu* is steeped in the sale of a deceased immovable property whose purchase price was paid by the applicant but transfer of which the respondent failed to effect. The draft order the applicant seeks is couched in these words:

“IT IS HEREBY ORDERED THAT:

1. The respondent is hereby ordered to deliver and register a four roomed house; comprising two bedrooms, kitchen, dining room and a toilet in either Nyameni, Dombotombo, Rujeko or Rusike high density Suburbs of Marondera, to the plaintiff (*sic*) within thirty (30) working days of this order.
2. In the event of the respondent failing to perform in accordance with para 1 above, the applicant is hereby empowered to execute this order against respondent’s property
3. The respondent to pay costs of suit on a client legal practitioner scale”.

THE FACTS

Respondent is a co-director of Pricassons Investments (Pvt) Ltd, a company, as can be gleaned from its letterheads – whose core business is buying and selling of stands and houses, developers and brokers, driving school, car hire, dealers in imported new and used cars, trucks and mini buses and construction of agreements of sale.

In December 2007 the respondent, acting on behalf of Joseph Tsamwayi the appointed executor of the estate of the late Patrick Tsamwayi, entered into an agreement of sale with the applicant in terms of annexure A1-A5 wherein the applicant purchased stand number 8 Dziva, Dombotombo, Marondera for a purchase price of Z\$18 billion. The salient terms of annexure A1-A5 are:-

- (i) Clause 2(c), providing that all the moneys shall be deposited into Pricassons (Pvt) Ltd's Standard Chartered account number 0100254284900;
- (ii) Clause 9, providing that in the event of the seller breaching any term or condition of this agreement and the seller fails to remedy the breach within 7 days of written notice to do so, then without prejudice to his rights at law, the purchaser shall be entitled to either cancel the agreement and claim damages which shall be equal to the value of purchasing a similar comparable property at the time of such claim or seek an order of specific performance;
- (iii) Clause 10, providing that the seller shall cede all rights in the property to the purchaser within three months of signing this agreement which time it is anticipated the seller would have been issued with the certificate of authority by the master; and
- (iv) Clause 11, providing that the agent Mr Patson Nawasha of Pricassons Private Limited hereby undertakes and guarantees that the seller will perform as per the agreement and in the event of any material breach he will be jointly responsible with seller in paying damages to the purchaser.

The applicant paid the full purchase price for the house which was brick under asbestos composed of two bedrooms, kitchen, lounge and toilet.

Respondent failed to fulfil his part of the agreement and admitted that he had sold a deceased estate house which had a dispute – the minor children of the deceased having refused to approve of the sale. On 4 July, 2008 the parties signed a memorandum of understanding (annexure 'B') clause two of which stipulated that the respondent would deliver to the applicant an alternative house within 14 days of signing of the memorandum. Despite this undertaking the respondent still did not deliver the alternative house. On 26 July, 2008 the respondent wrote to the applicant and her then husband Gideon Muchada reiterating that he wanted to honour his undertaking in annexure 'B' vide annexure 'C'. However, to date the respondent has not fulfilled his undertaking.

THE DEFENCE

In his opposing papers as well as the heads of argument the respondent basically raised three issues or defences.

The first is that there exists a material dispute of fact which cannot be resolved on the papers without hearing *viva voce* evidence. This is premised on the allegation by the respondent that the applicant averred that the respondent knew that the estate property had a

dispute and despite that knowledge he fraudulently misrepresented to the applicant to enter into the contract of sale. Because the respondent disputes this averment this necessitates the hearing of *viva voce* evidence.

The second issue raised is one of supervening impossibility. This is premised on the fact that the purchase price was deposited into the respondent's trust account and it remained there until the Zimbabwe dollar currency became moribund through no fault of respondent. This was out of his control hence constitutes a supervening impossibility to perform. He could not provide the alternative house he had guaranteed to do because the purchase price paid had been rendered valueless.

The third issue raised relates to non-joinder of the principal, viz Joseph Tsamwayi. For this averment the respondent relies on clause 11 of the agreement of sale alluded to *supra*, viz that in the event of any material breach of the agreement by the seller respondent will be jointly responsible with the seller in paying damages to the purchaser. The non-joinder of the seller, so the argument went, is fatal to the application.

Mr *Mahuni* is from the law firm Matsanura and Associates who are corresponding attorneys of Messrs Laita and Partners representing the respondent. The latter firm drafted the respondent's opposing papers including the heads of argument. At the hearing of argument Mr Mahuni conceded, correctly in my view, that the averments that there exist a material dispute of fact and also supervening impossibility have no legal leg to stand on. The concession's propriety is hinged on the fact that the alleged material dispute of fact is misplaced because the applicant's cause of action is founded not on the agreement of sale annexure 'A1-A5' but on annexures 'B' and 'C' and also that for more than a year the purchase price lay in respondent's trust account without respondent either purchasing an alternative house for the applicant or reversing the transfer of the deposited funds.

The sole issue that is left for my resolution is the one relating to the alleged non-joinder of the principal.

THE LAW AND ITS APPLICATION TO THE FACTS

In *Wood v Visser* 1929 CPD 55 WATERMEYER J at p 56 restated the general rule regarding the liability of agent in these words:-

"The general rule undoubtedly is that a person contracting with an agent can only sue the principal on that contract, but in some cases he can sue the agent; if for example he contracts with the agent as a principal, makes him his debtor and gives credit to him and not to his principal, then he can sue the agent personally on such contract".

See also *Blower v Van Noorden* (1909, T.S. 898) where INNES CJ said:-

“the usual test would be to enquire to whom the contracting party looked. *Nam in talibus contractibus semper inspiciuntur cujus fides secuta sit*. That would be the governing principle”

In clause 11 of the agreement of sale quoted above, respondent holds himself out as a guarantor and surety, and will be “jointly responsible with the seller in paying damages to the purchaser” in case of a material breach of the contract. He thus makes himself a co-principal debtor.

In *Neon & Cold Cathode Illuminations (Pty) Ltd v Ephron* 1978(1) SALR 463 it was held that the only consequence (albeit an important one) that flows from a surety also undertaking liability as a co-principal debtor is that vis-à-vis the creditor he thereby tacitly renounces the ordinary benefits available to a surety, such as those of excussion and division, and he becomes liable jointly and severally with the principal debtor, at 472 B-C. See also Caney’s The Law of Suretyship In South Africa, Juta and Co. Ltd 3rd ed. 1982 pp46-47.

In the instant case, it is beyond cavil that the unassailable interpretation that must be gleaned from the wording of clause 11 of the agreement of sale is that by holding himself out as a guarantor and surety, followed by his conduct of retaining the purchase price in his company’s trust account for some 13 months coupled with his undertaking in annexure ‘B’ as “agent and guarantor in the main agreement of sale to secure for the purchaser an alternative property within 14 days from the signing of this agreement”, the applicant purchaser looked to the respondent not only as a co-principal debtor but through novation via annexure ‘B’, as the sole debtor who could be sued in either instance alone without joining the principal or original principal as the case may be. In any event, by agreeing to be a co-principal debtor, respondent tacitly renounced the benefit of excussion and consequently it is idle for him to now clamour or grope for it. The applicant is perfectly entitled at law to proceed against either party at her discretion. The party successfully sued may be reimbursed by the other party who has not been joined to the suit.

CAN APPLICANT RIGHTLY DEMAND SPECIFIC PERFORMANCE FROM RESPONDENT

As far back as the 17th century it was held in *Cohen v Shires McHattie & King* (1882) 1 SAR 41 that Roman Dutch law clearly recognised the right to a specific performance of a contract. And in *Farmers’ Co-operative Society (Reg) v Berry* 1912 AD 343 at 350 INNES JA stated:-

“*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.”

That right has been recognised and re-affirmed in a plethora of cases such as *Woods v Walters* 1921 AD 303 at 309, *Haynes v King Williamstown Municipality* 1951(2) SA 371(A) at 378 D-F, and *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (HC).

It is settled law that the grant or refusal of an order for specific performance is entirely a matter for the discretion of the court in which the claim for specific performance is made: *Intercontinental Trading case supra at 26*.

This judicial discretion is not circumscribed by rigid rules, rather, each case must be judged in the light of its own circumstances. Courts have ruled that the remedy of specific performance can be eschewed where such an order is inequitable to the defaulting party or operates unreasonably harshly on the defendant, or where the agreement giving rise to the claim was unreasonable, or where the decree would produce injustice or would be inequitable under all circumstances, - see *Haynes case supra*.

In *Tamarillo (Pvt) Ltd v R.N. Aitken (Pty) Ltd* 1982(1) SA 398(A) MILLER JA at 442E-443H dealt with the question of what the plaintiff or the defendant must do in order to persuade the court, in the exercise of its discretion to grant or refuse an order for specific performance and on which party the onus lies. It is for the defendant to raise impossibility as a defence and the onus rests on him to prove impossibility.

In the instant case the respondent did not raise the defence of impossibility of performance. In fact the defence of supervening impossibility that was initially raised was abandoned at the hearing by Mr *Mahuni*. The sole defence that remained for resolution pertained to the non-joinder of the principal which I have already disposed of *supra*. Mr *Mahuni* submitted that the respondent was not disputing liability in the face of annexures ‘A’ and ‘B’. His only quarrel was regarding the non-joinder.

On the facts of this case, it has not been shown that a decree of specific performance as prayed for in the draft order would produce injustice or be inequitable or operate unreasonably harshly upon the respondent. On the contrary its refusal would wrought grave injustice or operate unreasonably harshly on the applicant who parted with her life time savings paying for a house which the respondent failed to deliver even following an undertaking to deliver an alternative property within 14 days yet the respondent kept her

money in his company's trust account for 13 months. To deny the decree and direct that the applicant should claim damages when the currency she paid is no longer of any value to anyone would offend against all known tenets of equity and justice. She performed her part of the contract and was not responsible for the respondent's non-performance. The statements of account attached to the respondent's opposing affidavit are of no probative value. They simply indicate that the applicant on 24 December, 2007 deposited Z\$15 billion. The statements run up to 29 February, 2008. It has not been proven that by February, 2009 when the new currency regime was introduced, the applicant's purchase price was still locked in that trust account. Respondent could have and must have used it for his benefit. Why should the applicant be unduly harshly treated by denial of the decree in the circumstances? Justice and even public policy considerations would not allow it.

In the result judgment be and is hereby entered for the applicant in terms of the draft order with the amendment in para 3 thereof that costs be on the ordinary scale.

Coghlan Welsh & Guest, applicant's legal practitioners
Laita & Partners, respondent's legal practitioners