

PRAMADVARA APPALRAJU
and
DHIREN VULI APPALRAJU
versus
MIRIAM PATSANZA

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 26, 29, January 2018 & 9 February 2018

Continuous Roll

T.R Mugabe, for the plaintiffs
O. Kondongwe, for the defendant

DUBE J: This is a claim for breach of contract.

Sometime in 2002 the plaintiffs sold to the defendant house number 14 Harrow Road, Avondale, Harare, [hereinafter referred to as the property] for ZAR350 000-00. The defendant paid a deposit of ZAR 100 000-00 and did not pay the outstanding balance to the plaintiffs. The plaintiffs cancelled the contract of sale for breach of contract. The plaintiffs seek an order for confirmation of the cancellation of the agreement of sale, payment of rentals, holding over damages and eviction of the defendant from the property.

The defendant defends the claim. She avers that the failure to finalize the sale was not caused by her. The plaintiffs breached the agreement. She challenges the plaintiffs' cancellation of the agreement of sale and her eviction from the property. In her plea, she refuted that the property was ever leased out. The defendant has filed a claim in reconvention. She stated that the plaintiffs have refused to accept a tender of the balance of the purchase price. She seeks an order for transfer of the property into her name and tenders payment of the outstanding balance of the purchase price. In the event that the court does not find favour with her claim, she seeks reimbursement of the deposit of ZAR 100 000.00 she paid and payment of \$120 890.00 being improvements and repairs she made to the property during the period that she was in occupation of the property.

The court was asked to determine the following issues,

1. Whether or not the plaintiffs or the defendant breached the terms of the

agreement of the verbal agreement of sale and if so whether the plaintiffs were entitled to cancel the agreement and alternatively whether or not the defendant is entitled to enforce the agreement.

2. Whether the verbal agreement of sale between the plaintiffs and defendant was validly cancelled and if so the appropriate remedy.
3. Whether or not the defendant is entitled to continue occupying the property and if so whether the defendant is entitled to enforce the agreement of sale entered into between the parties.
4. Whether the plaintiffs are entitled to arrear rentals and holding over damages for the property.
5. Whether the defendant is entitled to compensation for improvements and expenses incurred on the property and the quantum thereof.

The plaintiffs testified in their own case. Mrs Pramadvara Appalraju testified as follows: She entered into a verbal agreement of sale with the defendant for house no. 14 Harrow Road, Avondale, Harare for ZAR350 000-000 in 2002. She owns 50% of the property and the second plaintiff the other half. The defendant paid a deposit of ZAR100 000, 00. The balance of the purchase price was to be paid through her account all at once within months of the sale after which the house would be transferred into the defendant's name. The defendant failed to pay the balance of the purchase price. She was not contacted by any lawyer or advised that the defendant wanted to make further payment nor that the money had been put in her lawyer's trust account. Over the years she lost contact with the defendant. She wants the sale cancelled for breach of contract. She is prepared to pay back the deposit the defendant paid with interest and reimburse the defendant for the necessary improvements. When she was offered the ZAR250 000-00 outstanding in 2009, the plaintiffs felt that it was too late to make that offer. The defendant has put up a precast wall, razor wire and has tiled three of the rooms in the house. They are prepared to pay her for any improvements she made to the property if she can prove them.

Under cross-examination she testified that she tried to contact the defendant over the years but failed. At one time a friend of hers visited the house and was not allowed entry into the property. She tried to visit the property on a number of times and she was not allowed in. The defendant contacted her in 2009 and offered to pay the balance outstanding and she declined the offer. She breached the sale. Her son felt that it was unfair that she pays the balance

after so long and they cancelled the sale. She insisted that she was never contacted by the defendant's lawyers.

Dhiren Vuli Appalaraju testified as follows: His mother sold the house when he was 17 years old. He first met the defendant in 2006. The purpose of the meeting was to cancel the agreement. They had not had any contact with her since she paid the deposit. He told the defendant that he was cancelling the agreement because she had not met her promise to pay the balance of the purchase price. He did not believe that the transaction was fair any longer because of the lapse of time. The defendant has been leasing out the premises. Around 2004/5 he got a call from someone with a Pakistan accent claiming to be renting out the house and he wanted repairs done. Recently he discovered that Chris Lowe leased the house for US\$2000-00 a month. He produced a copy of the lease agreement.

He denied under cross examination that the plaintiffs were avoiding the defendant, insisting instead, that the defendant was the one who was avoiding them and that if she had wanted to see them in order to pay the balance she could have done so. She used to visit them at their house and knew where her mother resided because they concluded the deal at the same house. When they meet in 2006 she is the one who had contacted them. The witness remained consistent with his version throughout his testimony. The court believed him.

The defendant testified in her own case. Her evidence is as follows. She knows the first plaintiff well as their husbands were friends and they would visit each other's homes. She bought the house for ZAR350 000-00 and paid a deposit of ZAR100 000-00. The balance of the purchase price would be paid when they had found conveyancers in Harare and the balance would be put into her lawyers account. It is not correct that she was required to pay the whole balance all at once. The balance of ZAR250 000-00 was eventually paid to her lawyers, A. Smith Attorney and Associates in Johannesburg in 2005 and held in trust until the plaintiff had given instructions over where the money should be paid. When she met the first plaintiff in 2006, she expressed some difficulties in convincing her son to conclude the sale. She promised to get back to her and never did. She denied meeting the plaintiffs together in 2006. She only met the second plaintiff together with his mother in 2009 and discussed the cancellation of sale and asked them to return the deposit. She admitted that she leased out the house to Chris Lowe for 6 months. She spend up to US\$169 000.00 to fix the house. She has invoices. She wants to pay off the house, or if that fails, she asks for a refund of the deposit with interest and her improvements.

Under cross examination she told the court that she does not remember how much she paid for the improvements in Zimbabwean dollars and does not have the actual receipts for the improvements. She obtained new receipts and the amounts were translated by her contractor into United States dollars. The pre-cast wall she put up cost US \$3 500.00. Without the improvements, the property would not be having that value.

It is common cause that the parties entered into an agreement of sale of the property for the amount of ZAR 350 000.00. The defendant paid a deposit of ZAR 100 000.00. The agreement of sale was cancelled after the defendant did not pay the outstanding balance of the purchase price to the plaintiffs. The defendants made some improvements on the property. At some stage the property was leased to Chris Lowe. The issues for determination are who between the parties breached the contract of sale, whether the plaintiffs were entitled to cancel the contract. The other issue is whether the defendant is entitled to specific performance. The court was asked if it finds that the defendant breached the sale, that she is entitled to compensation for improvements and expenses incurred on the property. The court was also asked to consider whether the plaintiffs are entitled to any holding over damages and arrear rentals.

The defendant maintained that the sale was an instalments sale and that the plaintiffs avoided her resulting in her failing to pay for the property. She insisted that the agreement was that she would pay the balance of the purchase price when the parties had found conveyancers and the balance would be passed over to the plaintiffs' lawyers. She denied that she was required to pay the balance outstanding all at once. The plaintiff's first witness testified that the deposit was supposed to be paid all at once through her account and that this was in fact not an instalment sale. I believed the first plaintiff when she said that the balance of the purchase price was to be paid all at once into her account in the next few months. The plaintiff maintained her story during her testimony. She gave a clear and straight forward version of the events following the sale. If the parties had intended that the balance be paid over several months, the parties would simply have stated so. The defendant's version that the money would only be paid after they had found conveyancers in Harare is not convincing. She failed to pay the balance of the money all at once and only tried to pay the balance of the purchase price in 2009, six years later. She only deposited the balance with her lawyers in 2005 well after she had breached the agreement. I did not believe the defendant when she said that when she had met the first plaintiff in 2006, she had told her that she was having difficulties convincing her

son to conclude the sale. The evidence discloses that the parties did not meet again until the year 2006 when the defendant contacted the plaintiffs.

The plaintiffs maintained that they validly cancelled the contract as the defendant had failed to pay the balance outstanding. The reason for the cancellation of the agreement of sale was shown to be the failure to pay the full purchase price and to do so timeously. I am not convinced by the defendant's claim that the reason for the cancellation was because the second plaintiff was below 18 and did not simply want to be bound by a contract entered into when he was a minor. The second plaintiff was clear that they cancelled the contract because it wasn't fair that the defendant would go away for such a number of years without paying the full purchase price and insist on paying it after so long. The defendant claims that she lost contact with the plaintiffs is not convincing. It appears to me from the evidence that it is the defendant rather than the plaintiff who was avoiding the plaintiffs. She knew where the plaintiffs resided. If she had really wanted to pay the money she could have gone to their place of residence. The court was told that the plaintiffs had gone to the house and had been denied access. They had also sent friends in Zimbabwe to go to the house and they were also denied access to the house. The allegation that the plaintiffs were denied access to the property was not seriously refuted. I find that the plaintiffs were denied access into the property. The defendant avoided the plaintiff and avoided payment. There is no evidence that the plaintiffs were avoiding the defendant. She never looked for them. I see no reason why any communication from her lawyer would fail to get to the plaintiffs. The plaintiffs were being asked to accept the money 6 years down the line. The reason for the cancellation of the sale was the defendant's failure to pay.

The plaintiffs maintained that the defendant has been leasing out the premises and the defendant admitted that she has leased the premises for six months to Chris Lowe and realised \$12 000.00 in rentals in 2016. She denied leasing out the premises at any other time. The plaintiffs testified that they had been contacted by a number of people who claimed to be tenants at the premises. The plaintiffs have failed to give full details of these other persons. The period of their stay and how much they were paying is not known. Only the tenancy of Chris Lowe has been proved. It was not shown that the tenant is still in the premises. The plaintiffs challenged the defendant to prove the improvements she made to the property. The evidence led discloses that the defendant made some improvements to the property. She produced quotations from her contractor. The quotations are reconstructions. She testified that she put up a precast wall at a cost of \$3500.00. This was not denied by the plaintiffs. She did not produce proof of the cost of the wall.

In *Zimbabwe Reinsurance Company Ltd v Musarurwa* HH-141-2001 the court dealt with a matter requiring the definition of an instalment sale. The court held that the definition of instalment sale agreement requires that payment should be made in three or more instalments or by way of a deposit and two or more instalments. As regards the time when obligations for performance where no definite time is specified, the court in *Mackay v Naylor* 1917 TPD 5333 AT 537-38, said the following,

“the general rule of law is that obligations for the performance of which no definite time is specified are enforceable forthwith ----- but the rule is subject to the qualification that performance cannot be demanded unreasonably as to defeat the object of the contract or to allow an insufficient time for compliance.” See *The Law of Contract in South Africa, R.H Christie 5th Ed p503*”.

My understanding of the law is that an instalment sale is a sale in which a buyer makes regular payments to the seller in order to settle the indebtedness owed. The instalments must be agreed on and certain. Interest is usually charged on the balance outstanding. A sale does not become an instalment sale simply because the parties agreed to a deposit being paid first with the balance being paid later on a specified date. It has to be shown that there was agreement that a deposit be paid with the balance outstanding being paid in three or more instalments. Where no definite time is given for the performance of an obligation arising out of a contract, the debtor is obliged to perform his obligation within a reasonable time.

Wessels, The law of contract in South Africa vol 11parag 3135 states that:

“The court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance on his part (Lawson , s 472, p522). A party is not entitled to a specific performance where he has failed to show that he has performed in terms of the contract.” See also *Wolpert v Steenkemp* 1917 AD493 p499.”

The remedy of specific performance is only available to a party who has complied with his part of the contract. A party who intends to rely on the remedy of specific performance must show that he has performed his part of the contract or that he is willing to perform or discharge his own obligations in terms of the contract. He may not seek to rely on the remedy of specific performance where he has failed to perform his part of the bargain. A party who fails to fulfil the obligations of a contract commits breach. The injured party becomes entitled to resile from the contract and may seek damages arising out of the breach.

The agreement entered into between the parties does not qualify as an instalment sale for the reason that it was never a term of the contract that after payment of the deposit, the balance outstanding would be paid in two or more instalments. The plaintiff was clear that the balance outstanding was required to be paid all at once in the next few months. The defendant

testified that the agreement was that the balance of the purchase price would be paid when they had found conveyancers in Harare and the balance would be put into her lawyers account. Even on the basis of the defendant's own evidence, the terms of the contract do not make it an instalment sale. She does not state that the money would be required to be paid in instalments. There was no provision for more than two instalments. It is clear that the balance was to be paid all at once. No instalment terms were agreed to. The fact that the plaintiffs refer to the sale as an instalment sale in their pleadings does not make it an instalment sale.

The agreement of sale did not stipulate the exact date when this money was required to be paid. In any case where a contract of sale does not specify the date of performance of an obligation, the obligation is to be performed forthwith. Performance can however not be demanded unreasonably. The obligation is required to be performed within a reasonable time. The defendant failed to pay the balance of the purchase price as stipulated and within a reasonable time and hence breached the agreement of sale. A delay of 6 years is cannot by any sense of imagination be said to be reasonable. The plaintiffs were entitled more than 6 years down the line to cancel the contract for breach of its terms. It would be unfair to expect the plaintiff's s to accept the balance of the purchase price after such an unreasonable and lengthy time. The defendant failed to comply with the terms of the agreement entered into between her and the plaintiffs. Having found that it is the defendant who in fact breached the agreement of sale, it follows that the plaintiffs were entitled to cancel the contract. The defendant's claim for specific performance falls away. She is barred from claiming specific performance because she breached the contract. Her claim in reconvention fails. The defendant is entitled to reimbursement of the deposit she paid to the plaintiffs. She did not ask for interest on the deposit she paid in her claim.

The claim for arrear rentals and holding over damages was not fully articulated. It has not been shown that there were other people who occupied the property besides Chris Lowe. The tenants are not known nor has it been established how much they were paying and for how long. All the plaintiffs are entitled to is \$12 000.00 being rentals admitted to by the defendant. The holding over damages stem from the allegation that the defendant was leasing the house. For the reason that the plaintiffs have not shown that the defendant had tenants in the house at the time summons was issued or currently, I decline to make an award of holding over damages.

As regards the deposit the defendant paid, I find that the defendant is entitled to reimbursement of the deposit of ZAR 100 000.00 she paid. The defendant did not ask for interest on that amount in the summons. She is not entitled to an award of interest on the sum

claimed. The defendant gave a list of the improvements made. The court's concern is with the fact that insufficient evidence was led in support of the cost of the improvements made. None of the original receipts were produced. She produced a quotation from Camsbray Construction (Pvt) Ltd dated 8 August 2002 which shows that she repaired a damaged roof walls and floors among a lot of other things. A global figure of \$ 68 800.00. There is no itemised bill with the different charges for each improvement or work carried out. Another quotation from the same company shows that on 16 April 2003 she constructed an outside cottage and a staff cottage and painted the inside of the house. An estimate cost of these works is given as US\$63 500.00. There is a note to Mrs Patsanza done by S. Mariga dated January 2003 in hand written form. The note shows that he cleared the yard, cleaned the pool he charged Zimbabwean dollars \$18200.00. Another note shows that he did landscaping in 2005 and charged \$8700,00. He does not state the currency of that money although he initially put a US Dollar sign and struck it out. Whilst she claimed that she tiled the house, no proof of such an improvements was shown to the court. No one knows how much she paid for the tiles.

Whilst she identified the different works carried out, she did not produce sufficient and acceptable proof of the cost of the improvements. The actual receipts issued for the cost of the improvements were not produced. Instead the defendant asked the person who carried out the works for a reconstruction of the works done and charges. The contractor was not called as a witness. Her claim was given in United States dollars when the improvements were primarily made during the Zimbabwe dollar era. The flaw with this approach is that the improvements were done during the Zimbabwean dollar era and thus should have been expressed in Zimbabwean dollars first and converted into United States dollars.

She told the court that she does not remember how much she used in Zimbabwean dollars. Whilst she initially claimed to have some of the receipts, she admitted in cross-examination that she did not have them. The conversions were done by one Mariga, her contractor who was not called as a witness. No-one knows how he was able to reconstruct the quotation and convert the figures from Zimbabwean dollars to United States dollars. The formula used is not known. The defendant's story was not convincing.

Once the defendant decided to express the charges in United States dollars she needed to show how she arrived at the figures presented. No one knows, including the defendant herself, how this conversion was done. The true value of the defendant's improvements is not known. The defendant has failed to prove her improvements. She adopted a lackadaisical approach to the question of improvements choosing to pile the court with unexplained

documents. The fact that the plaintiffs were not challenging her claim for improvements did not mean that she did not have to prove the improvements. I have considered that the plaintiffs are prepared to reimburse the defendant for improvements she effected on the property if she can prove them. I have decided in the exercise of my discretion to afford the defendant an opportunity to prove the improvements should she wish to do so. I am granting absolution from the instance with respect to the claim of improvements.

As regards the costs of these proceedings, I cannot say that the defendant has been successful in her claim in reconvention with respect to the reimbursement of the deposit because the plaintiffs have always been willing to pay her back the deposit she paid. Costs follow the event.

In the result it is ordered as follows:

1. The plaintiff is to pay to the defendant ZAR 100. 000.00.
2. The cancellation of the verbal agreement of sale of certain piece of land situate in the District of Salisbury being Sale division 3 of Lot 34 Black D of Avondale, measuring three thousand seven hundred and fifteen square meters held under Deed of Transfer No. 4427/2001, also known as 14 Harrow Road, Avondale, Harare, Zimbabwe is hereby confirmed.
3. The defendant and all those claiming occupation through her are hereby evicted from 14 Harrow Road, Avondale, Harare, within 3 months of the service of this order on them
4. Should they fail to do so, the Sheriff of the High Court is hereby authorized to evict them.
5. The defendant shall pay \$12 000.00 being rentals to the plaintiffs.
6. Absolution from the instance is granted in respect of the claim for improvements.
7. The defendant shall pay the plaintiffs costs of suit in both the claim in reconvention and the main claim.

Tafadzwa, Ralph Mugabe Legal Counsel, plaintiff's legal practitioners
Dube Manika & Hwacha, defendant's legal practitioners

