MAZHAR RAWOOF PETKAR N.O

And

MILLY MIRRIAM GAIBIE N.O

Versus

ALEXANDRE PAULO CASTANHEIRA

And

RACHEL SALU CASTANHEIRA

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 8, 9 FEBRUARY AND 23 JUNE 2022

Civil Trial

Advocate L. Nkomo, for the plaintiffs
Advocate P. Dube, for the defendants

MAKONESE J: On the 5th June 2006 the plaintiff issued summons against the defendants seeking an order for the cancellation of an agreement of sale against the refund of all amounts paid by the defendants on account of the purchase price as at the date of issue of the summons. The defendants disputed the claims by the plaintiffs. The matter proceeded to trial. At the close of the plaintiffs' case, I granted absolution from the instance. The matter went on appeal. The Supreme Court set aside the order for absolution and the matter was referred back for evidence to be led from the defendants. The defendants opened their case

and evidence was led. I now have to determine whether the plaintiffs have proved their case on a balance of probabilities after taking into account the evidence led by the plaintiffs and the defendants.

Background Facts

On 25th January 2005 the parties entered into a written agreement of sale in respect of a building known as Sunkist Flats, situate at number 68 Samuel Parirenyatwa Street, Corner 6th Avenue, Bulawayo. In terms of the agreement the plaintiffs sold to the defendants the immovable property for an agreed amount of Z$11.5 billion, subject to certain terms and conditions set out in the agreement. The history of the matter leading up to the signing of the written agreement is largely common cause. In late 2005, the defendants were looking for a building to buy for the purpose of running an educational institution. The defendants were already running another institution, offering tuition to students of the University of South Africa (UNISA). They needed space to open a school. During negotiations preceding the signing of the contact, all the income patterns of the defendants' business were disclosed to the plaintiffs. The plaintiffs initially indicated an asking price of Z$6.5 billion. By the end of December 2005, the defendants had raised Z$5 billion through a loan. With this amount at hand, the defendants sought a meeting with the plaintiff in early January 2006. At that time, however, the plaintiffs indicated that the price was no longer Z$6.5 billion, but Z$12 billion. This of course was due to the rampant inflation in the country at that time. After intense negotiations, during which full disclosure of the defendants' income patterns was made, the parties reached agreement on a price of Z$11.5 billion. 2nd plaintiff undertook to draw up an agreement of sale. Before the agreement was drawn, 2nd plaintiff insisted on payment of the available sum of Z$5 billion. An agreement of sale was subsequently drawn and signed by the parties. It is common cause that the defendants were given an account number into which they

paid a total of Z$9.2 billion. This account was held by 2nd plaintiff who had immediate access to what was paid into this account. It is not disputed that defendants were unable to pay the amounts due by the 27th January 2006. After further discussions, the parties signed an addendum which gave the defendants a further deadline for payment and provided for penalties upon failure to meet the required deadline. It is common cause that after payment of Z$9.2 billion defendants enquired from the 2nd plaintiff about who at Ben Baron and Partners Legal Practitioners they should contact to enable them to pay the Capital Gains Tax. Defendants were referred to a Mr Lunat, an agent of the plaintiffs, who indicated that the Capital Gains Tax must be paid to the plaintiffs. The defendants disagreed, and impasse developed between the parties on the question of whom the Capital Gains Tax was supposed to be paid.

The joint pre-trial conference memorandum of issues filed by the parties for the purposes of trial sets out the following issues for trial:

1. Whether the defendants are in breach of contract.

2. Whether plaintiffs' cancellation of the agreement of sale was in terms of the Contractual Penalties (Chap 8:04).

3. Whether plaintiffs attempted to restitute the amount paid by defendants towards the sale due to breach.

4. Whether plaintiffs are entitled to cancel the agreement based on defendants' breach of contract.

5. The onus on the plaintiffs on all issues.

MATERIAL TERMS OF THE AGREEMENT

The entire dispute in this matter revolves around the issue of payment. The following clauses of the agreement are pertinent:

Clause 4:2: required payment of Z$5 billion by the date of signature of the Agreement. The agreement was signed on 26th January 2006, and payment had already been made by 23rd January 2006. Nothing turns on this payment. It was made timeously.

Clause 4:3: stated that a second payment of Z$5 billion would be paid by 27th January 2006.

Clause 4:4: stated that the last Z$1.5 billion was due upon occupation of the property by the purchasers.

Clause 4:6: placed the onus of obtaining vacant possession of the property sold upon the defendants thus putting defendants in control of the timelines for the payment of the Z$1.5 billion.

Clause 4:5: provided that all amounts paid would be released to the plaintiffs, save for any amounts due as Capital Gains Tax, which amounts would be paid to the Conveyancers.

The two other material clauses are the parole evidence and non-variation clause (Clause 3.6 and 3.7) and the non-waiver and non-indulgence clause (Clause 3.2).

APPARENT CONTRADICTIONS IN THE AGREEMENT OF SALE

A perusal of the agreement of sale discloses deep contradictions. The lack of clarity on payment terms is one of the reasons that led to this current litigation. On the one hand, the agreement stipulates that Capital Gains Tax was to be paid to the Conveyancers. On the other

hand, the agreement of sale provided for payment of the entire purchase price to the plaintiffs, or on agent of the plaintiffs, with only Capital Gains Tax withheld. It is not specified by whom. The contradiction is of a material nature in that the decision as to whether there was a breach or not depends on the interpretation of the clauses.

The Plaintiffs' Case

The plaintiffs filed both the agreement of sale and the addendum as part of their case. During the course of the proceedings the plaintiffs also produced as exhibit 2a, a schedule showing the defendants' payments totaling Z$9.2 billion made to the first plaintiff and exhibit 3, a letter from Joel Pincus, Konson and Wolhuter Legal Practitioners who were then legal practitioners for the plaintiffs. The plaintiffs led oral evidence from the two witnesses. The first plaintiff confirmed wholesale, together with all and any defects therein, the evidence, beliefs and recollections of the second plaintiff. The evidence of the first plaintiff that he confirmed and adopted was of little probative value to the court. The first plaintiff had no independent recollection of the matter and did not corroborate the second plaintiff's evidence in any material respects. It has to be observed that corroboration can only be supplied by independent evidence of a witness giving independent recollections of an incident at issue. Only one question was put to the first plaintiff, under cross-examination, which elicited new evidence from the witness. The following exchange occurred between the first plaintiff and defendants' legal practitioner:

"Q. Who is the registered owner of the property?

A. I am. I gave it to my brother, but I am not the registered owner."

The only independent aspect of the witness's evidence was that he was not the registered owner of the property. Under cross-examination the witness suddenly wept in court.

He informed the court that he and his father had worked hard to acquire the building at issue. He then indicated that it was not proper for the property, "to go just like that." The witness asked the court for "a good judgment." The first plaintiff was clearly emotional.

The second plaintiff gave evidence central to the plaintiffs' claims. He was the single and key witness in this matter. Clause 1.2 of the agreement provides as follows:

> "It is recorded herein that the purchase price has been determined and agreed in the context of the prevailing Midrate of Exchange between the Zimbabwean and United States Dollar….."

The second plaintiff confirmed that the purchase price was set by him at an equivalent of USD$120 000 which was a reasonable price for the building, and acceptable to him at the time. The second plaintiff accepted that the Midrate only changed between the 25th and 3rd March 2006. The suggestion that the purchase price was eroded by the slide of the Zimbabwean dollar in a period of two months is baseless. The second plaintiff confirmed that he signed both the agreement of sale and the addendum and signed both in his own name and on behalf of the first plaintiff. This much is evident from an examination of both documents. Second plaintiff testified that he co-owned the building with the first plaintiff. The witness testified that defendants failed to pay the purchase price by 27th January 2006 as stipulated in the agreement of sale. Initially the witness stated that he tried to pursue the defendants to no avail. He alleged that upon chasing the defendants he failed to reach agreement with them. He later conceded that he had signed the addendum with the defendants. After the addendum was signed the witness averred that the defendants were given up to 28th February 2006 to settle the balance. By 28th February, the defendants had not paid the entire purchase price. The witness stated that he then approached his lawyers who issued a notice to remedy the breach. By the time the notice and demand were issued, the defendants had paid a total of Z$9.2 billion. Such

payments were recorded and agreed by the parties prior to the issuance of summons. The witness affirmed that his claim was for cancellation of the contract and that he was tendering a refund of all monies paid by the defendants against such cancellation. Under cross-examination an entirely different picture began to emerge. The plaintiff was moving away, and in some instances contradicting his initial evidence. The witness sought to allege that when the addendum was signed on 16th February 2006, the defendants had already breached the agreement of sale by failing to pay the sum of Z$10 billion into his account by 27th January 2006. The witness admitted that on the face of it, the addendum did not give the sellers the right to cancel the agreement on account of non-payment, with the extended time limits. The witness conceded that the addendum gave the sellers the right to levy interest at the rate of 80% or at the NMB Bank investment rate, for any further delays in paying off the purchase price. The witness emphatically denied under cross-examination that he had advised the defendants how much they needed to pay on account of Capital Gains Tax inspite of a demand having been made to settle that amount. When it was put to the witness that his lawyers had pleaded on his behalf that Capital Gains Tax was in the sum of Z$2.3 billion the witness stood firm that there was no way he could calculate and demand Capital Gains Tax from the defendants. Under cross-examination the witness contradicted the pleadings on the amount, excluding Capital Gains Tax, which remained due to him under the agreement. He pleaded mistakes in the calculations. The witness further contradicted the terms of the agreement of sale, and contrary to the wording of the notice of demand written by his legal practitioners, and the pleadings on record, that the Capital Gains Tax was payable directly to the conveyancers. The witness kept insisting that the money was his money and that it should have been paid to him. Later, under cross-examination the witness had departed from his earlier evidence and sought to assert that he had indeed "estimated" Capital Gains Tax in the sum of Z$2.3 billion. The witness conceded that up to the time demand was made by his legal practitioners, he had not opened a file at Ben

Baron & Partners or supplied the firm with an irrevocable power of attorney as required by the agreement of sale. The witness conceded that the following payments were made to the plaintiffs by the defendants:

(a) Z$9.2 billion into plaintiff's account which was nominated in the agreement of sale.

(b) Z$2.3 billion in various instalments to Joel Pincus, Konson & Wolhuter.

(c) Z$54 208 844 on account of interest to Joel, Konson & Wolhuter.

It was accepted by the second plaintiff that at the time the last two payments were made by the defendants, plaintiffs still did not have an account with the nominated conveyancers for payment of Capital Gains Tax.

The Defendant's Case

Alexander Paulo Castanheira gave evidence in support of the defence case. He testified that defendants own two schools in the City of Bulawayo, College of Creative Arts-Africa and Higher Learning Centre. Towards the end of 2005 defendants were looking for a building to purchase. Mr Moyo who was employed by Knight Frank Estate Agents introduced the defendants to the plaintiffs. The plaintiffs were selling the building which is now the subject of this dispute. The plaintiffs took the defendants on a tour of the building. Defendants observed that the building was totally dilapidated. The building needed painting, the toilets were not functional. Defendants agreed to purchase the building and renovate it to their standards. Initially defendants offered to buy the building for ZS1.5 billion. This was rejected by the plaintiffs who wanted the sun of Z$6.5 billion for the building. Defendants explained that they raised their money from tuition fees which was paid per semester. The plaintiffs indicated that they wanted not less than Z$6.5 billion for the property. Defendants secured a

loan of Z$5 billion in December 2005. Plaintiffs asked the defendants to deposit the sum of Z$5 billion into their account immediately to secure the purchase. Eventually after intense negotiations the parties settled on the sum of Z$11.5 billion. Agreement was reached in early January 2006. The first payment of Z$5 billion was made prior to the signing of the written agreement on 26th January 2006. The witness testified that he realized that the plaintiffs had lied when they said go ahead and pay the deposit of Z$5 billion, the agreement has been prepared. The agreement was prepared after the initial payment had been effected. The witness indicated that he made the initial deposit of Z$5 billion at Gweru, where they were operating a church. He drove to Bulawayo only to find out that the agreement of sale had not been prepared. The parties signed the agreement of sale but only after the witness pressurized the plaintiffs to regularize the agreement by having a written document. The witness indicated that they subsequently took occupation of the property and immediately effected renovations to the building. Applications were made to the City of Bulawayo for the changes that would be made to the building. Extensive renovations were made to make the building functional. Electrical fittings and plumbing were done. The toilet system was also fixed.

It became common cause that the defendants were given an account number into which they paid a total of Z$9.2 billion. This account was held by 2nd plaintiff with Stanbic Bank. The witness agreed that the defendants were unable to pay the amounts due by the 27th of January 2006. However, after negotiations the parties drafted and signed an addendum. This addendum gave the defendants a deadline for payment and provided for penalties upon failure to do so. The witness testified that after payment of the Z$9.2 billion to the plaintiffs he enquired from the 2nd plaintiff about who at Ben Baron and Partners they should pay Capital Gains Tax to. The witness stated that he found it odd that he should pay Capital Gains Tax to Mr Lunat who was neither mentioned in the agreement of sale nor the addendum.

The witness was subjected to extensive cross-examination. He maintained that he complied with the agreement of sale and the addendum. The witness denied that he had breached the terms of the agreement and highlighted that the addendum provided that in the event that the purchasers failed to pay the balance of the purchase price by the 28th February 2006, then the purchasers would be charged interest calculated at the rate of 80% per annum backdated to the 15th of February 2006. The witness pointed out that in terms of the addendum further interest would be calculated at the NMB investment rate of interest on the 28th February 2006. The witness stated that the addendum made a specific provision that this would be the new rate of interest to be charged should they be a further extension of time. It was suggested to the witness that he had failed to pay the entire purchase price on due date and the witness could only reiterate that the purpose of the addendum was to grant an extension of time and to levy interest should there be any further extensions. Under re-examination 1st defendant was asked whether the mid-rate of exchange ever changed up to the time the amount of Z$11.5 billion was paid. The witness indicated that it had not changed and that at that relevant time the Z$11.5 billion translated to the sum of USD 112 000. 1st defendant pointed out that to his dismay, he had paid the plaintiffs what they demanded of him but almost 17 years later he has been in occupation of the property without title deeds to the property.

The second witness for the defendants was Rachel Salu Castanheira. She confirmed that she is married to the 1st defendant. The witness confirmed that the building in question was purchased for the purpose of running a school from that property. This witness testified that extensive renovations had been done to the building with the express authority and knowledge of the plaintiffs. In particular the following improvements were made. Some walls were pulled down, more toilets were constructed, additional classrooms were erected, the walls were painted, plumbing was done from the ground floor to the 2nd floor. The floors were tiled

in the entire building. As at September 2009 the building was valued at USD $800 000. This witness denied that there had been ever any cancellation of the agreement of sale.

WHETHER THERE WAS A MATERIAL BREACH OF THE CONTRACT

The plaintiffs argue that the defendants committed multiple breaches of the agreement of sale as read together with the addendum. The plaintiffs further argue that the manner of computation of the penalty interest on the outstanding balance of the purchase is irrelevant to the determination of the material breach. With respect, this approach cannot be correct. From the totality of the evidence led by the plaintiffs and the defendants it is clear that a total of Z$9.2 billion was paid by the defendants into the plaintiffs' bank account by the 30th of March 2006. This much can be gleaned from Annexure "B" appearing at page 120 of the record. The record clearly indicates that when the addendum was executed on the 16th of February 2006 the parties agreed in writing that any extension of time would attract a penalty of 80% interest on the balance outstanding. The terms of the addendum are clear and in accordance with what the defendants understood to be the consequence of any further extension. It is of importance to note that the addendum did not have a cancellation clause whether expressly or impliedly. It is common cause that after payment of Z$9.2 billion the defendants enquired from the 2nd plaintiff about where to pay the Capital Gains Tax. The plaintiffs' reading of the agreement was that the defendants should have paid the Capital Gains Tax to 2nd plaintiff. This again, with respect, would amount to the release of this amount to the plaintiffs against the provisions of the agreement of sale. In my view, this ambiguity with regard to the Capital Gains Tax must inure to the detriment of the plaintiffs, as the *proferens*. This matter turns essentially on the interpretation of the clauses of the agreement of sale as read together with the addendum.

In *Chiokoyo* v *Ndlovu & Ors* HH 321-14, UCHENA J, (as he then was), explained the golden rule of interpretation, which is essentially that words in a statute or indeed a contract

must be given their ordinary grammatical meaning. The learned Judge summarized the rule as follows:

> *"Words in a statute must be given their ordinary grammatical meaning. This was stressed by SANDURA JA in the case of Madoda v Tanganda Tea Company Ltd 1999 (1) ZLR 374 (SC) @ 377 A-D where he said;*
>
> *"By adopting that approach to the interpretation of s. 7 of the Code the learned Judge in the court a quo departed from the ordinary grammatical meaning of the section, and therefore erred. As JOBERT JA said in Coopers & Lybrand & Ors v Bryant 1995 (3) SA 761 (A) at 767 D-F;*
>
> *"The matter is essentially one of interpretation. I proceed to ascertain the common intention of the parties from the language used in the instrument. Various canons of Constitution are available to ascertain their common intention at the time of concluding the cession. According to the "golden rule" of interpretation the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity, or some repugnancy or inconsistency with the rest of the instrument."*
>
> *The same view was subsequently expressed by my brother MC NALLY in Chegutu Municipality v Manyora 1996 (1) ZLR 262 (S) at 264 D-E.*
>
> *where he said:*
>
> *"There is no magic about interpretation. Words must be taken in their context. The grammatical and ordinary sense of the words is to be adhered to, as Lord WENSLEYDALE said in Grey v Pearson (1857) 10 ER 1216 at 1234, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the*

instrument, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further."

It is clear that on the application of the golden rule of interpretation the following was agreed by the parties:

1. That the defendants would pay an amount of Z$11.5 billion for the building in question.

2. That of that amount, all payments would be released to the plaintiffs, save for any amount reserved for Capital Gains Tax, which amount would be paid to the conveyancers, Ben Baron & Partners.

3. The sum of Z$2.3 billion was agreed to be the proximate tax liability of the plaintiffs on the transaction.

This simple meaning of these clauses of the agreement was admitted by the 2nd plaintiff under cross-examination. This meaning of the clauses accords with:

1. The manner in which the plaintiffs' case was pleaded in paragraphs 5, 6 and 7 of the Declaration.

2. The letter from the plaintiffs' Legal Practitioners dated 15th March 2006.

In the light of plaintiffs' pleadings and the totality of the evidence led, it cannot be anything but common sense that the amount of Z$2.3 billion was, by consent, set to be the Capital Gains provision. It must follow that the parties' agreement was that Z$9.2 billion plus any penalties imposed for delay in terms of the addendum was to be released to the sellers. It is common cause that all amounts were paid to the 2nd plaintiff. The agreement provided that the plaintiffs were to advise of an account into which payment would be made.

The plaintiffs gave defendants the bank account of one of them. Therefore, whatever was paid into that account was automatically released to the plaintiffs. The defendants had no control over the funds once paid in this manner. They were at the disposal of the plaintiffs. Indeed, first defendant testified that the 2nd plaintiff took the money and used it to transact business in South Africa. In my view, the defendants paid the full sum that was payable to the plaintiff under the agreement to the plaintiffs. Interest attracted by that amount was calculated by the plaintiffs, albeit wrongly, and was paid. From the evidence, the defendants complied with their obligations and suffered their penalty in terms of the parties' agreement as amended. The plaintiffs had no right therefore, to turn around and purport to cancel the agreement.

It is salutary practice in sales of properties that accords with the defendants reading of the agreement. This salutary practice is that the purchase price is released to the seller only upon the passing of transfer. The purchaser's concern, in the acquisition of an immovable property, is obtaining title. The seller concern, is the payment of value for its property. Agreements of sale will normally provide that the parties exchange value simultaneously, with the seller receiving its money, and the purchaser its title and rights in the property. In the present case, the parties sought to ensure the future transfer of the property to the defendants by providing for separate payment of the Capital Gains to the conveyancers.

I find therefore, on the first issue for trial, that plaintiffs failed to prove on a balance of probabilities that there was a material breach of the agreement.

WHETHER PLAINTIFFS' CANCELLATION OF THE AGREEMENT OF SALE WAS IN TERMS OF THE CONTRACTUAL PENALTIES ACT

The plaintiffs contend that the material breach of the contract is on the basis of which the plaintiffs became entitled at law to cancel the agreement occurred during the 30 days

statutory notice that was given on the 15th of March 2006 in terms of the Contractual Penalties Act (Chapter 8:05). The parties are at variance as to the nature of the default. It is however common cause that the defendants had paid, directly to the plaintiffs, the sum of Z$8.75 billion by the 28th February 2006. It is clear that an interest figure, though disputed by the defendants as it was compounded interest, and included interest on Capital Gains Tax, was calculated by the plaintiffs. It is common cause the interest was paid. There can be no argument that this interest ought to have been paid by 28th February 2006. The interest was a penalty for payment after 28th February 2006. It is also not in dispute that the defendants paid the balance needed to complete the Z$9.2 billion. Therefore, legally there was no basis for the plaintiffs to seek cancellation of the agreement in terms of the Contractual Penalties Act. The plaintiffs elected to deal with any alleged breaches and ring-fencing themselves against loss of value by reference to punitive interest rates, investment interest rates and mid-rate exchange rates. I would therefore, find that the plaintiffs could not try and cancel the agreement and at the same time pocket the entire purchase as provided for the agreement of sale.

The rest of the issues set out for the trial in the memorandum of issues have been canvassed in the issues raised in this judgment. No evidence was led by the plaintiffs to show that they made any efforts to restitute the defendants what was paid towards the purchase price.

CONCLUSION

On the evidence led by the parties, it is clear that there was intention to novate the payment terms of the Contract as evidenced by the signature of the addendum. The conduct of the plaintiff by levying interest on late payments as provided for in the addendum evinced an intention to remain bound by the terms of the agreement. It is trite that once a compromise agreement is concluded, it precludes an action on the original debt, except where the compromise specifically or by clear implication provides that the original claim shall revive in

the event of non-performance of the terms of the compromise. See: *Nkomo* v *Ncube* HB 57/15. Once the plaintiffs in this matter had agreed on a compromise agreement, they had no right to revert to the original right to cancel the agreement. It appears common cause to me, that the legal implications of entering into an addendum are that it created new and binding terms, which gave rights to the plaintiffs and obligations to the defendants. The plaintiffs' right extended to penalizing the defendants with interest in the event of breach. The rights did not include the right to cancel the contract for breach.

DISPOSITION

Having found that the plaintiffs have no right to cancel the agreement of sale, the plaintiffs' claim must be dismissed with costs.

Accordingly, it is ordered as follows:

1. The plaintiffs' claims be and are hereby dismissed.

2. The plaintiffs are ordered pay the costs of suit.

Moyo & Nyoni, plaintiffs' legal practitioners
Messrs Lazarus & Sarif, defendants' legal practitioners