EXAVIER MAONEKE
versus
TRUSTEES OF MOUNT OLIVE TRUST

HIGH COURT OF ZIMBABWE
CHITAPI J
HARARE, 28 June and 21 September 2022

Opposed Application – Judgment on merits

E Mubayiwa, for the applicant
T L Mapuranga, for the respondent

CHITAPI J: This judgment is to be read together with the judgment HH 417-22 which was delivered on 28 June 2022 dealing with a point *in limine* raised by the respondent to effect that the application ought to be dismissed because there are material disputes of fact not capable of resolution. In that judgment, I set out the facts on which this application is based. It was necessary to do so because the court could not have properly determined whether the applicant's case was comprised of irresolvable material disputes of facts without setting out the facts of the case and considering them. No useful purpose will be served by regurgitating the facts. The factual background as set out in judgment HH 417/22 does not change. Despite all this, I will still set out material facts which ground the application as it is unavoidable to do so otherwise the judgment will not flow. The inevitable regurgitating of the same facts already traversed shows the undesirability of writing piecemeal judgments.

At the commencement of the hearing on the merits, Mr *Mubayiwa* for the applicant abandoned the prayer for the alternative relief as set out in the draft order in para 6-9. The amended draft order will now read as follows, with para 10 in the original draft order becoming para 6:

> "IT IS ORDERED THAT:
> 1. The application be and is hereby granted.
> 2. The respondent be and is hereby ordered to take all necessary steps to effect transfer of stand 14068 Salisbury Township of Salisbury Township Lands measuring 2011 square metres to the applicant within 3 days of the issuing of this order.
> 3. The respondent shall submit to the Zimbabwe Revenue Authority for interviews to obtain a Capital Gains Tax Certificate and shall make all such payments for the certificate as required by law.

4. In the event that first respondent fails to comply, the Sheriff of the High Court or his lawful deputy be and is hereby ordered, authorized and directed to attend to the transfer of the property described above into the name of the applicant by attending to the ZIMRA interviews and signing any relevant documents necessary to effect the transfer of the property to the applicant.
5. The applicant in that event shall pay the amount required for capital gains tax and recover his money from respondent.
6. Respondent shall pay all costs incidental to the appointment of the valuator and for the valuation of the property."

The applicant in brief averred that he loaned money to the respondent which loans were secured by mortgage bonds registered over a property, Stand 14068 Salisbury Township held under Deed of Transfer No. 1057/2016. The mortgage bonds were registered in favour of the applicant being firstly registered No. 1914/20 dated 24 September 2020 in the sum of USD$75 000.00 and registered No. 322/21 dated 18 March 2021 in the sum of USD$90 000.00 and registered No. 2025/21 dated 18 August 2021 in the sum of USD$120 120.00.

The applicant averred that following the failure to repay the loans, him and the respondent executed in November 2021, a repayment agreement wherein the amount due was agreed to be the sum of US$285 500.10. The agreement was attached to the founding affidavit as annexure E. The highlights of the agreement were that the mortgaged property was valued at USD$300 000.00. The period of repayment of the loan was extended to 10 December 2021. The respondent hoped to have secured a buyer for the property by the same date of 10 December 2021. In the event that the respondent failed to secure a buyer by 10 December 2021, the property would be offered to the applicant for USD$300 000.00 and the sale agreement between the applicant and the respondent would be executed on 11 December 2021.

The applicant attached as Annexure F to the founding affidavit a copy of the sale agreement between him and the respondent in terms of which the property was then sold to the applicant for USD$180 000.00. The applicant explained that the reduction of the sale price from USD$300 000.00 to USD$180 000.00 was renegotiated with the respondent and agreed to after the applicant had shown the respondent evidence of bigger properties which the applicant had already bought for lesser amounts. The applicant averred that the respondent's representative Cleopas Nyikadzino Mathabiri signed the sale agreement on behalf of the respondent, together with a declaration by seller and power of attorney to transfer the property. The power of attorney and declaration are attached to the founding affidavit as Annexures G and H. The applicants averred that the representative of the respondents also provided a copy of this national identity card to facilitate the process of capital gains assessment. Applicant averred that he attended at the Zimbabwe Revenue Authority (ZIMRA) for his interview as per

procedures on 7 January 2022. The applicant averred that the respondent's representative changed goal posts after attending at ZIMRA and sought to resile from the agreement. The applicant disclosed that he filed case No HC 447/22 against the first respondent, ZIMRA and the Registrar of Deeds and Companies. He prayed for the relief that ZIMRA should complete the process of assessing and issuing the capital gains certificate. He stated that he then withdrew the application after noting from the respondent's herein's opposition in that matter that the respondent was resiling from the agreement. The applicant therefore filed the current application claiming in the main, specific performance of the sale agreement on dispute.

The respondent filed an opposing affidavit. Apart from raising the point *in limine* that there were material factual disputes which were incapable of resolving the matter an objection which the court dismissed, the respondent raised a further objection that there was no cause of action arising in the application because there was nothing specific to perform. The respondent submitted that the agreement of sale, power of attorney and seller's declaration were all signed as security for a loan advanced to the respondent. To properly appreciate the factual conspectus in relation to the position of the respondent, the deponent to the opposing affidavit stated as follows in paragraph -

> "4.4. I aver that whatever applicant seeks, it is legally untenable given that the Agreement of sale, the Power of Attorney to pass transfer and the declaration by seller were all signed as security for a loan advanced to the respondent.
> 4.5. These documents do not grant any rights for the applicant to take transfer of the respondent's property for it is based on what I have been advised to be a *pactum commissorium* which I understand is unlawful and of no force and effect."

The objection of no cause of action was not persisted in. However, the respondents above depositions which were not withdrawn have narrowed the areas of factual divergence between the parties. In short, the import of the depositions is that the respondent admits that the documents in issue were signed by it or on its behalf. There can be no question therefore about their authenticity in content. The point of divergence is the purpose for executing the documents. It therefore appears to me that the gravamen of the application is to decide whether the relationship between the parties taking into account the documents and other evidence relied upon by them constituted a *pactum commissorium*.

A *pactum commissarium* has been defined in our law and is not a grey area. In the case of *Upper Class Enterpirses (Pvt) Ltd v Oceaner t/a Enigma Promotions and 2 Ors* SC 88/2002, CHEDA JA stated as follows on p 4 of the cyclostyled judgment:

> "A *pactum commissorium* has been defined; as a pact by which the parties agree that if the debtor does not within a certain time release the thing given in pledge by paying the entire debt;

> after the lapse of the time fixed; the full ownership in the thing will invariably pass to the creditor in payment of the debt." See *Chimutanda Motor Spares (Pvt) Ltd v Musar & Another* 1994(1) RLR 310; at 314, and *Van Rensberg v Wielblen* 1916 OPD 247 at 252.
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> The reasons why a *pactum commissorium* should not be enforced in our law are discussed in *Mapanduka* v *Ashington* 1919 AD 343 at 351.
>
> In short, the authorities say that *pactum commissorium* is not enforced in our law. See also *Sum Life Assurance of Canada* v *Kuranda* 1924 AD 20 at 24; *Baines Motors* v *Pief* 1955(1) SA 534."

At p 5 of the judgment, the learned judge stated:

> "While South Africa may have moved towards accepting exceptions to the rule that a *pactum commissorium* in invalid and unenforceable, there are no authorities to suggest that such exceptions have become part of outlaw in Zimbabwe."

The reason for the law not to recognize the *pactum commissorium* as legally valid is that, the pact between the debtor and the creditor is that the debtor's property is surrendered to the creditor as security for repayment of a debt. The pledging or surrender of property as security does not confer a right of ownership of the property to the creditor. The interest or right of the creditor is to recover the full amount of the debt failing which the creditor must sue for repayment of the debt and seek for an order that the security held is declared executable to recover the money due upon execution. If more than the amount due is realized, the excess is paid to the debtor and if less is realized, execution can be levied on other assets of the debtor or by other lawful manner of execution. In any event the Contractual Penalties Act [*Chapter 8:04*] gives the court power to intervene and determine whether a contractual penalty stipulation is disproportional to any prejudice suffered by a creditor as a result of a breach of an agreement by the debtor where the contract contains a penalty stipulation. The court has power to reduce the penalty to the extent that it considers equitable or to grant other relief which it considers fair. Therefore, a *pactum commissorium* on the other hand offends the law in that whereas the law already provides for the court's intervention to achieve justice between the creditor and debtor, the *pactum commissorium* provides for the takeover of the pledged property without considering the equities presented by the circumstances.

In casu the respondent in order to establish the defence of *pactum commissorium* was required to show that the lending agreement contained a stipulation that in the event of default of repayment within the fixed period, the applicant would take over full ownership of the property securing the debt. The loan agreements of which one is Annexure C.1 to the founding affidavit was not disputed by the respondent specifically. Instead the respondent disputed the

amount of the lending which it averred to be US$25 550.00 and that it repaid USD$40 000.00. A *pactum commissorium* is not constituted where there is an agreement wherein any pledged security will not pass on/or its ownership be transferred to the creditor in the event that there is default in repayment as agreed. Further the agreement of sale which the4 respondent does not dispute but explains it as having been executed merely to facilitate the borrowing of USD$25 500.00 does not provide that the property devolves to the applicant by forfeiture for non-payment of the debt. It is in fact a stand-alone sale agreement for value. The *pactum commissorium* defence therefore is not established on the facts of this application.

The next issue to consider is whether or not the applicant's prayer for specific performance ought to be granted. The remedy of specific performance is available to parties to a contract for proven breach at the instance of the party seeking that the one in breach should perform his or her contractual obligations in terms of the breached contract. Specific performance unlike the relief of damages for breach of contract which is a remedy available as of right is granted in the discretion of the court.

In the case of *Jetinos Zivanomoyo* v *Helen Bawange Dingani* HMA 02/19 MAFUSIRE J stated as follows of specific performance in para 10 – 12:

> "10. The point is, a purchaser who buys a property and performs his side of the bargain, or is ready to perform, is entitled to take title. The seller is obliged to deliver. If he fails or neglects or refuses to do so, the purchaser is entitled to specific performance. This is quite elementary. As long as 1912 INNES JA said in *Farmers' Co-operative Society* (*Reg*) v *Berry* 1912 AD 343 at 350:
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> > '*Prima facie* every party to a binding agreement who is ready to carry out his obligations 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'.
>
> 11. A plaintiff has the right to choose whether to hold a defendant to his contract and claim performance by him of what he bound himself to do, or to claim damages for breach. See *Haynes* v *Kingwilliams Municipality* 1951(2) SA 371(A) at p 378. The defendant has no such right of election. He cannot claim to be allowed to pay damages instead of having an order for specific performance entered against him. In the exercise of its discretion the court may grant or refuse specific performance. Specific performance will be refused if it will lead to an injustice or if it will be unduly harsh or burdensome on the defendant.
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> 12. The court exercises its discretion to grant or refuse specific performance judiciously not whimsically. The discretion is not confined to specific types of cases. It is not circumscribed by rigid rules. Each case depends on its own set of facts. See *Inter-Continental Trading (Pvt) Ltd* v *Nestle Zimbabwe (Pvt) Ltd* 1993(1) ZLR 21(H)."

In the determination of whether or not to grant specific performance, the court will accordingly be guided by the *dicta* expressed as quoted. Unfortunately for the respondent, upon a reading of the opposing affidavit it approbates and reprobates its position at the same

time. It is a trite and celebrated principle of the procedural law that a party is not permitted to approbate and reprobate in the same proceedings. See *Shatirwa Investments (Pvt) Ltd* v *Metallon Gold (Pvt) Ltd & 2 Ors*; *Associated Mine Workers Union of Zimbabwe* v *Mazowe Mining Company (Pvt) Ltd & 3 Ors* HH 160-20.

The respondent on one hand admitted the agreement of sale. Therefore, in that regard, the parties executed an agreement for sale of the property. The respondent in the same breadth stated in paragraph 12 of the opposing affidavit:

> "12.2. The respondent did not enter into the said Agreement of Sale but it was required to sign those documents as conditions to secure the loan from the applicant.
> 12.3. The applicant just imposed the documents to be signed to secure the loan and is the one who imposed the dates to be written on all documents."

The respondent ought to have taken one position. The position which the respondent first took which failed was that it entered into the agreement but seeks to avoid the agreement on the basis that it constituted a *pactum commissorium*, a position taken *in limine* unsuccessfully. To then state that the respondent did not enter the agreement contradicts the earlier position. The respondent then questioned the amount of the borrowing and again denied that there were negotiations for the sale of the house or negotiations for a reduction in the sale price. The respondent cannot accept and reject the same instrument. The procedure for pleading to a claim is to admit, deny or confess and avoid. This is elementary to the trained legal practitioner.

Mr *Mubayiwa* submitted that since the respondent admitted making the agreement but was not agreed with the contents, its remedy was to seek a correction or rectification of the agreement. The respondent did not counter-claim for cancellation of the agreement either yet it admitted it but sought to impugn it. Reliance was placed on the decision in *Mhene* v *Teabis* 1986(2) ZLR 179. Where parties execute a contract between them and one party considers that its contents are incorrect, that party cannot seek an order of invalidity of the contract but an order that the contract is corrected to reflect what the parties agreed upon. *In casu*, the respondent was content to impugn the agreement which it had admittedly signed.

It is a trite principle of the law that a court does not re-write a contract executed by the parties. In the case of *Magodora & Ors* v *Care International Zimbabwe*, SC 24/14 the court stated that:

> "The role of the court is to interpret contracts not to rewrite a contract or exercise any of the parties from the consequences of the contract that they have freely and voluntarily accepted even if they are shown to be onerous or oppressive. This is a matter of public policy."

The respondents counsel submitted in the heads of argument that the court should look at the substance of the contract and not its form. *In casu* the sale agreement is not ambiguous. It is in the manner of any ordinary sale agreement of fixed property. The purchase price was signed off as having been paid. There is nothing in the sale agreement to suggest that it was anything else but a sale agreement of immovable property. Once the respondent admitted the existence of the agreement, it could not then seek that the court should revise its contents as to their authenticity or correctness without seeking the setting aside of the admitted agreement or its correction. The respondents sought reliance on the decision of the Supreme Court in the case *Pearson Mzilikazi & Anor* v *Magaret Marume & 2 Ors* SC 39/2016 to argue that the court could not order specific performance on an illegal agreement. The case authority is easily distinguishable on the facts. In that case the borrower or debtors filed an application to declare agreements of sale and transfers made invalid. The creditor filed a counter claim for eviction because the property had already been transferred. There were a number of irregularities committed in the transactions with *inter-alia* the power of attorney to transfer having been falsified and transfer registered without a capital gains certificate having been obtained. Importantly, the court was being called to cancel the deeds of transfer. There is no such claim made *in casu.* The respondent simply admits the agreement and then impugns its contents without asking the court to declare what the correct terms of the agreement between the parties were.

The last issue is to determine whether specific performance should be granted. The remedy is discretionary. The respondent averred that even if the court determined that there was no *pactum commissorium* arising in the transaction, the agreement of sale should not be enforced because there was no resolution of the respondent to sell the property. The applicant submitted that authorization of the representative of the respondent to represent it was clear from the papers because at all times he represented the respondent.

The submission is curious because the respondent seeks that the applicant should establish the existence of a resolution of the respondent to sell. On the contrary it is the respondent who should establish the absence of a resolution and/or take steps to nullify the agreement on that score or basis. The respondent in any event admitted the agreement. The issue of a resolution becomes in my view a red herring and an instance of reprobating what has been approbated. The respondent has failed to show contrary to what it asserted that the transaction was a simulated sale. The respondent has used the notice of opposition not as a

defence but as a sword of attack, to impugn the agreement whilst leaving the agreement standing but praying for the dismissal of the claim

In property sales, the usual relief sought by parties to the contract of sale where there has been committed an actionable wrong is cancellation of the agreement and ensuing damages or specific performance. The applicant performed its obligation to pay the purchase price. Specific performance under the circumstances is the most equitable remedy and it will be so ordered.

Resultantly the applicant is entitled to claim and to be granted an order of specific performance. In respect of costs no arguments were made to persuade the court that the successful party is not entitled to his or her costs. It shall be so. There is no basis for the claims for a punitive order of costs and no justification was given to claim them. The following order is made:

IT IS ORDERED THAT:

1. The application be and is hereby granted.
2. The respondent be and is hereby ordered to take all necessary steps to effect transfer of stand 14068 Salisbury Township of Salisbury Township Lands measuring 2011 square metres to the applicant within 3 days of the issuing of this order.
3. The respondent shall submit to the Zimbabwe Revenue Authority for interviews to obtain a Capital Gains Tax Certificate and shall make all such payments for the certificate as required by the law.
4. In the event that first respondent fails to comply, the Sheriff of the High Court or his lawful deputy be and is hereby ordered, authorized and directed to transfer of the property described above into the name of the applicant by attending to the ZIMRA interviews and signing any relevant documents necessary to effect the transfer of the property to the applicant.
5. The applicant in that event shall pay the amount required for capital gains tax and recover his money from respondent.
6. Respondent shall pay costs of suit.

Koto and Company, applicant's legal practitioners
Rubaya &Chatambudza respondent's legal practitioners