DISTRIBUTABLE: (112)

JOHN TRANOS MATUKUTIRE
v
(1) TINASHE JOHN MAKWASHA (2) FIONAH TOMA MAKWASHA (3) RATIDZAI MATUKUTIRE (4) THE REGISTRAR OF DEEDS

SUPREME COURT OF ZIMBABWE
MAVANGIRA JA, MATHONSI JA & KUDYA JA
HARARE 9 MARCH, 2021 & 14 OCTOBER, 2021

F Mahere, for the appellant

GRJ Sithole with K Makombera, for the first and second respondents

P Seda, for the third respondent

MAVANGIRA JA:

INTRODUCTION

1. This is an appeal against the whole judgment of the High Court handed down on 20 July 2020. The court *a quo* granted an order of specific performance, declared Stand 1235 Good Hope Township of Lot 16 of Good Hope measuring 1841 square metres to be the property of the first and second respondents and ordered the appellant and the third respondent to sign all papers transferring the said property to the first and second respondents. It also ordered them to pay costs of suit on an attorney and client scale jointly and severally, the one paying the other to be absolved.

FACTUAL BACKGROUND

2. On 8 August 2018 the appellant entered into an agreement of sale with the first and second respondents. He sold to them an immovable property being Stand 1235 Good Hope Township of Lot 16 of Good Hope in Harare.

3. The agreement cites the appellant as the "seller" and the first and second respondents as the "purchaser." On the last page of the agreement the appellant signed as the seller. The third respondent signed as his witness. Beneath her signature are written the words "Sold by Mrs Ratidzai Matukutire."

4. In terms of clause 1 of the agreement of sale the full purchase price for the immovable property was USD45000. On 31 July 2019 the first and second respondents instituted proceedings in the court *a quo* seeking an order of specific performance by the appellant and the third respondent, it being their contention that they had paid the purchase price in full and that the failure or refusal, despite demand, to transfer the said property into their names was therefore unjustified.

5. In his founding affidavit the first respondent stated that on 7 August 2018, the second respondent (his wife) and him paid the sum of USD25 000 "in hard cash" to the appellant and the third respondent (the appellant's wife). He further stated that on 8 August 2018 they paid the balance in the sum of USD20 000, to the appellant and the third respondent and that on that same day they reduced the terms of the agreement of sale into writing.

6. He contended that the full purchase price having been paid, it was incumbent upon the appellant and the third respondent to transfer the property to him and the second respondent. He further contended that the failure by the appellant and the third respondent to transfer

the property to them was a breach of the agreement of sale and that in terms of the agreement such breach entitled him and the second respondent to make the claim for specific performance for the transfer of the property to them.

7. In his opposing affidavit the appellant denied that any payment had been made to him as required in terms of the agreement. He denied receiving any of the alleged two payments. He averred that the first and second respondents had "in blatant disregard of the bold and clear clause two (2) of the agreement of sale … paid USD25 000 in hard cash" to the third respondent who was not authorised to receive payment on his behalf. To that end, he contended, the first respondent had not met his side of the bargain.

8. The appellant denied having breached the agreement. He stated that he awaited the first and second respondents' compliance with their obligations in terms of the agreement for him to, in turn, perform his duties in terms thereof. He stated that he could not transfer the property without receiving the full purchase price. He averred that it was the first and second respondents who were in breach of the agreement, thereby entitling him to a remedy in terms thereof.

9. Although labelled as an opposing affidavit the third respondent's affidavit purports to support the first and second respondents' claim. She averred that she is not a co-owner of the property and that she was not a party to the agreement. She further averred that she only acted as a marketer in the transaction as evidenced by the execution clause of the agreement.

10 With regard to the payment of the purchase price, all that the third respondent curtly states is "My mandate extinguished as soon as I handed over the price of US$45 000 to the first Respondent."

DECISION OF THE COURT *A QUO*

11 As stated earlier, the court *a quo* granted an order in favour of the first and second respondents. It held that the appellant could not rely on strict adherence to clause 2 of the agreement in respect of the payments as the clause was not yet in existence when the payments were made and therefore the clause could not apply in retrospect. The court also held that the appellant was estopped from denying giving the third respondent authority when they had created the impression that they were selling the property together. The court was also of the view that the appellant had received the full purchase price as he instructed his legal practitioners to invite the first and second respondents to pay conveyancing fees. This was so, the court found, in view of the fact clause 1.13 of the agreement stipulated that conveyancing would be done after the purchase price had been paid in full. The court a quo reasoned that the appellant's legal practitioners were his agents and they would not, on their own accord, have moved to transfer title in the property from their principal to the first and second respondents without the instructions of the appellant for them to do so. It opined that the appellant must have received the full purchase price and that his conduct was reprehensible and showed the highest degree of dishonesty. It found that the first and second respondents had proved their case on a balance of probabilities.

THIS APPEAL

12 Aggrieved by the decision of the court *a quo* the appellant filed this appeal on the following grounds:

"1. The Court *a quo* erred at law in granting an order of specific performance when the 1st and 2nd Respondents had not complied with the agreement they sought to enforce.
2. The Court *a quo* grossly misdirected itself on the facts by ordering the appellant to transfer an immovable property to the 1st and 2nd Respondents when there was no evidence that the 1st and 2nd Respondents had paid the full purchase price for the stand in terms of the agreement."

13 The appellant's prayer is for the appeal to be allowed with costs. Furthermore, for the judgment of the court *a quo* to be set aside in its entirety and be substituted by an order dismissing the application with costs on an attorney and client scale.

ISSUE FOR DETAMINATION

14 The issue for determination in this matter is whether or not the court *a quo* erred in granting the first and second respondents' claim for specific performance.

SUBMISSIONS BEFORE THIS court

(a) <u>The appellant's case</u>

15 Miss *Mahere* for the appellant, submitted that the crux of the appellant's case was that the agreement that the parties entered into required that cash be handed over to him in hard currency. No cash was handed to him in hard currency meaning that the first and second respondents did not perform in the manner and form specified in the agreement. Consequently, the first and second respondents could not demand specific performance from the appellant.

16 She submitted that the principle of law relied upon is enunciated in *Motor Racing Enterprises (Pty) Ltd (In Liquidation) v NPS (Electronics) Ltd* 1996 (4) SA 950 (A). She elaborated that in contracts where the principle of reciprocity applies, a plaintiff who demands performance without having themselves performed will not be entitled to specific performance as their own performance must be exact or *in forma specifica*. She referred the court to a number of case authorities which will be reverted to as necessary later in this judgment.

17 She further submitted that the appellant's stance is that he will perform once payment has been made to him. He thus awaits receipt of the purchase price. She submitted that the third respondent had no mandate to receive the purchase price in violation of clause 2 of the agreement.

(b) <u>The first and second respondents' case</u>

18. Mr *Sithole* for the first and second respondents, submitted that the judgment of the court *a quo* cannot be faulted because the evidence on record established that the first and second respondents discharged their obligation of paying the purchase price in full. He said that the payments that the first and second respondents made were not questioned in any of the opposing affidavits. These payments were reflected in Annexure "A" which reflected a payment on 7 August 2018 to the third respondent of USD25 000 and Annexure "B" which is headed "**Statement**" and bears the address:

> " GLOBAL VILLAGE STANDS
> Plot No 16 Beema Road Mount Hampden
> Harare
> Harare, Zimbabwe +263"

19. Annexure "B" also reflects that it is addressed to:

> "Tinashe John Makwasha
> Fiona Toma Makwasha
> Apartment 1, Laplage Complex,
> Lumumashi
> DRC"

20. Mr. *Sithole* further submitted that the third respondent received payment in her capacity as seller of the immovable property as reflected in the execution clause of the agreement of sale. He also submitted that the raising by the appellant's legal practitioners of a pro-forma invoice for conveyancing fees which fees were duly paid into the appellant's legal practitioners' account is constitutive of part of the evidence that the first and second respondents had discharged their contractual obligations.

21. Mr *Sithole* was unable to make any submissions on the effect, if any, of the *Magodora* case, *infra*, on the first and second respondents' case. Regarding the effect of the *caveat subscriptor* rule, he submitted that the court ought to relax the rule *in casu*.

22. It was his final submission that the appellant had failed to establish a demonstrable basis warranting the vacation of the judgment of the court *a quo*. The appeal must therefore be dismissed with costs on the attorney and client scale.

(c)The third respondent's case

23. Mr *Seda* for the third respondent, submitted that the third respondent's involvement was more to answer on factual issues regarding payment of money and transmission of the same to the appellant. He submitted that the appellant created confusion by involving the third respondent and by having the execution clause of the agreement reflecting that the

property was "sold by" her only to allege later that she only signed as a witness. He also submitted that the calling for and the payment of conveyancing fees could only be confirmation that the purchase price had been paid. He confirmed that there had however not been any transfer of the property.

ANALYSIS

24. The appellant's case centres around clause 2 of the agreement of sale. The clause provides:

> "2. All payments to be made by the Purchaser to the Sellers in terms of this agreement shall be paid by the Purchasers to **John Tranos Matukutire in hard currency cash."** (verbatim including the bold print)

Thereafter, clause 6 then provides as follows:

> "Once the payments payable in terms of this agreement have been paid in full or have been satisfactorily secured and conditions mentioned in clause 3 above have been complied with, transfer shall be effected by the Seller's Conveyancers, … The parties shall, within 14 (fourteen) days of being called upon to do so, execute all documents which may be required to enable transfer to be registered. Should either party fail to execute such documents with (sic) the aforesaid period that party shall be deemed to be in breach of this agreement of sale."

25. Clause 13 is also of importance. It reads:

> "This agreement is the whole contract between the parties and any other representations or stipulations not included herein shall be of no force and effect except where this is reduced to writing and signed by both parties."

26. Clause 2 clearly and unequivocally stipulates the form, mode and manner of payment of all payments to be made by the purchasers to the seller in terms of the agreement. No doubt the purchase price is the primary or principal payment that the purchasers

had to make. There is no doubt that clause 2 was not complied with. The court *a quo* was alive to this fact and stated as follows at p88 in its judgment:

> "The applicants paid full purchase price for the property. They, however, did not pay the same to the first respondent. They, in the mentioned regard, would appear to have violated clause 2 of the agreement of sale which they signed with the first respondent on 8 August 2018. The clause instructed them to pay the purchase price to no one else but to him. It is for the mentioned reason, if for no other, that he insists that they breached the contract as a result of which he cannot transfer title in the property to them."

27. It appears to me that the court *a quo* misdirected itself by disregarding the centrality of clause 2 to this matter when it further proceeded to state at pp 88-90 as follows:

> "The first respondent cannot place reliance on clause 2 of the contract in so far as the payment by the applicants of US$25 000 and US$10 000 are (sic) concerned. The applicants made those two payments before the agreement upon whose clause he places reliance had come into existence. They paid US$25 000 on 7 August, 2018. The contract was signed on 8 August 2018. The payment was, therefore, made a day earlier than the day that the parties' contract came into existence. The sum of US$10 000 was made on the day that the parties signed the contract. The applicants' uncontroverted evidence on the matter is that they paid the sum of US$10 000 before the first respondent and then signed the contract.
>
> The above-observed matters render the defence of the first respondent nugatory. The clause which was not existent when the two payments were made cannot come to his aid. It is inapplicable to his case. It is inapplicable for the simple reason that it does not operate in retrospect."

28. I view this as misdirection by the court *a quo* because the first and second respondent's claim was based on the written agreement, Annexure "C" to the founding affidavit. At paras 10 and 11 of the founding affidavit the first respondent stated as follows:

> "10. In terms of the agreement of sale, upon compliance of conditions (sic) by the Purchasers, the Seller was to execute all documents necessary for transfer to the Applicants.
> 11. The Applicants have to date not attained transfer of the property with the 1st and 2nd Respondents being in breach of the agreement."

29. In *Bobby Maparanyanga v The Sheriff of the High Court & Anor* SC 132/02 GWAUNZA AJA, as she then was stated:

> "The second respondent failed to comply strictly with the condition that the purchase price was to be paid upon the signing of the contract. Instead, he offered an alternative mode of payment. The learned trial judge was satisfied no material breach of the contract was thereby committed. Without spelling it out in so many words, he was, effectively, also satisfied that under the circumstances of this case, the alternative mode of payment offered and guaranteed was equivalent and equally effective to the one stipulated in the contract. I am not satisfied, on the facts presented, that this conclusion was based on a correct interpretation of the law."

R.H.Christie, in his book *The Law of Contract in South Africa*,[1] refers to performance effected in exactly the manner specified in the contract as being *in forma specifica* and that effected in some equivalent manner that is equally effective as being *per aequipollens*. Asserting that the distinction between the two is not always easy to make, the learned author offered, among others, the following guidelines (as per CLAASEN J in *Van Diggelen v De Bruin*)[2] for determining the issue –

(i) if the circumstances (surrounding the case) afford no clue, then there is a presumption that the condition must be performed *in forma specifica* (*Wessels* para 1337; Pothier *Oblig.* 206). This presumption is rebuttable by the promissor, but it cannot be rebutted where it is clear from the terms of the contract and the surrounding circumstances that performance *in forma specifica* was stipulated in the contract (*Wessels* paras 2638-9) (my emphasis); and

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[1] 3 ed at p 456
[2] 1954 (1) SA 188 (SWA) 192-3

(ii) the act or performance tendered *per aequipollens*, where such is permissible, must in the first instance be an equivalent act to that mentioned in the contract or be of such a nature that it can make no material difference to the promissee.

30. The *Maparanyanga* case (*supra*) involved a judicial sale of an immovable property. The principles in the quoted passage from the judgment are however equally applicable *in casu*. In *Mbayiwa v Chitakunye & Anor* SC 43/08 the following was stated at pp 6-8 of the judgment:

> " In Anson's Law of Contract 26 ed at p 425 it is pointed out that:
> 'Tender of payment to be a valid performance must observe exactly any special terms which the contract may contain as to time, place and mode of payment.'
>
> In Halsbury's Laws of England Vol 9 para 523 it is stated that:
>
> > A tender of performance which is not in accordance with the terms of the contract may be withdrawn and may not preclude the promissor from subsequently making within the time limited, a tender of performance in a proper manner; but this will not be the case where the incorrect tender is to be construed as a repudiation of the contract.
>
> R H Christie in *The Law of Contract in South Africa* 3 ed at p448 states that:
>
> > 'To be a valid tender it must comply with all the requirements of a valid performance, since the basis of the effect which the law gives to a valid tender of performance is that the debtor was correct in thinking that what he was attempting to achieve amounted to proper performance and that it was due to no fault of his own that he was unable to achieve it. Therefore, when performance is to be made at a specified time and place, a tender will not be valid unless it is made at that time and place.' "

31. The bold statement at para 15 of the founding affidavit that "(T)he Applicants fully paid the full purchase price in terms of the agreement of sale" is not supported by the first and second respondents' own averments with regard to payments allegedly made. They did not perform in accordance with the terms of the contract that they seek to enforce.

32. It is trite that a party seeking specific performance must itself have performed its part of the agreement or be willing to do so. This is clearly enunciated in *Grandwell Holdings (Private) Limited v Zimbabwe Mining Development Corporation & Ors* SC 5/20 where the following was stated:

> "As to the remedy of specific performance in the law of contract, it is accepted that it is aimed at upholding the contract and obtaining the performance of the terms of the contract as agreed. Indeed, specific performance is the primary or default remedy for breach of contract and is usually claimable …
> … However, the right to claim specific performance is predicated on the concept that the party claiming it must first show that he or she has performed his or her obligations under the contract or is ready, willing and able to perform his or her side of the bargain. Even then, the court has a discretion, which should be exercised judicially, to grant or refuse a decree of specific performance. It follows therefore that the court's discretion should not be exercised arbitrarily or capriciously …"

33. Clause 2 is plain and clear in its language. In *Frumer v Maitland* 1954 (3) SA 840 (AD) at 850 A-B the court held:

> "Where the language is plain, I think, the golden canon of interpretation has been crisply stated by GREENBERG JA in *Worman v Hughes & Ors*, 1948 (3) SA 495 at 505 (AD):
>
> > 'It must be borne in mind that in an action on a contract, the rule of interpretation is to ascertain, not what the parties' intention was, but what the language used in the contract means, i.e. what their intention was as expressed in the contract.'
>
> From the nature of the function of a suspensive condition it seems to me that this rule should in that case, if anything, be more strictly adhered to than in regard to other terms of a contract."

34. In terms of clause 2, the first and second respondents were to make all payments that they were to make in terms of the agreement, to the appellant "in hard currency cash". Payment had to be made *in forma specifica*. On the papers, no payment was so made. Payments were allegedly made to the third respondent. The third respondent's purported confirmation of payments having been made to her, albeit not made in clear terms, does not avail the remedy of specific performance to the first and second

respondents. The tendered payments were not made in terms of the contract. The court *a quo* therefore erred in granting such remedy to them, there having been no valid tender or payment in terms of the agreement. The reliance on payments apparently made before the existence of the written contract does not assist the first and second respondents' case especially in view of para 13 of the written agreement which records that "this agreement is the whole contract between the parties" and that any other representations or stipulations not included in it shall be of no force or effect unless reduced to writing and signed by both parties.

35. By virtue of the same clause 13, the contention that the third respondent validly accepted payment for the appellant as his agent cannot carry the day in the absence of an appropriate amendment of the agreement to that effect, properly reduced to writing and signed by the parties. As stated by R H Christie in The Law of Contract in South Africa 3 ed:

> "A non-variation clause … entrenches not only the other clauses in the contract but also itself against the possibility of informal variation, so if it desired to vary any clause in the contract informally or to do informally whatever it is that a restriction clause entrenched by a non-variation clause restricts the parties to doing in writing, the non-variation clause must first be varied."

36. The above goes hand in hand with the parole evidence rule. The rule was aptly stated in *Nhundu v Chiota & Anor* 2007 (2) ZLR 163 (S) at 166 C-H where this court cited with approval the following remarks made by WATERMEYER JA in *Union Government v Vianini Ferro-Concrete Pipes (Pvt) ltd* 1941 AD 43 at p47:

> "Now this Court has accepted the rule that when a contract has been reduced to writing, the writing is, in general, regarded as the exclusive memorial of the transaction and in a suit between the parties no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such document be contradicted, altered, added to or varied by parole evidence."

The same principle is stated by R H Christie, *supra* ed at p 212.

In any event, if the appellant had already received the US$25 000 on 7 August 2018, clause 2 would be expected to have stated or recorded that the said amount had already been paid. The terms of the written agreement bind the parties and require the first and second respondents to perform in accordance with clause 2. Such performance did not happen.

37. The contention made concerning the payment of conveyancing fees to the appellant's legal practitioners, cannot in my view, overrun the effect of the failure by the first and second respondents to perform in accordance with clause 2, particularly in view of the appellant's stance that the third respondent had no mandate to receive payment in contravention of the stipulation in clause 2.

38. In granting the order that it did the court *a quo* excused the first and second respondents from the clear terms of the agreement between the parties. One may venture to say it enforced some form of hybrid that included an alleged oral agreement between the parties. Needless to reiterate that the purported oral agreement has not been proven. In *Magodora & Ors v Care international Zimbabwe* 2014 (1) ZLR 397 at 403 C-E PATEL JA stated:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them 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 so as a matter of public policy. See *Wells v South African Alumenite Company* 1927 AD 69 at 73; Christie *The Law of Contract in South Africa* 3 ed at pp 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598

(A) at 615D; *First National Bank of SA Ltd v Transvaal Rugby Union & Anor* 1997 (3) SA 851 (W) at 864 E-H."

39. Notably, the appellant and the third respondent took vastly different positions. The court *a quo* could not have resolved these different versions without hearing *viva voce* evidence. It proceeded to opt for or proceed on the basis of the third respondent's version in circumstances in which the appellant could not challenge her evidence and it was not tested.

DISPOSITION

40. The court *a quo* misdirected itself. The appeal is meritorious. Its judgment must be vacated. Costs will follow the cause. Miss *Mahere* conceded that instead of an order of costs on the attorney and client scale, an order of costs on the ordinary scale in the substituted order sought in the appellant's prayer would be appropriate.

41. In the result it is ordered as follows:

1. The appeal be and is hereby allowed with costs.
2. The judgment of the court *a quo* be and is hereby set aside in its entirety and substituted with the following:

"The application be and is hereby dismissed with costs."

MATHONSI JA …….. I agree

KUDYA AJA …….. I agree

Mhishi Nkomo Legal Practice, appellant's legal practitioners

Muvirimi Law Chambers, 1st and 2nd respondent's legal practitioners

Sawyer & Mkushi, 3rd respondent's regal practitioners