HB 179/18
HC 1207/06

**YUSUF ABDULLA GAIBIE**

**And**

**MAHMOUD MAI ABDULLA GAIBIE**

**Versus**

**ALEXANDER PAULO CASTANHEIRA**

**And**

**RACHEL SALU CASTANHEIRA**

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 6 JUNE & 5 JULY 2018

**Civil Trial**

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

**MAKONESE J:** The defendants have made an application for absolution from the instance at the close of the plaintiff's case. The defendants contend that the plaintiffs had failed to lead evidence upon which a court might find in favour of their claims. The application is made on the basis that an essential of the claim, an alleged breach of contract was not proved in sufficient evidence. Further, the plaintiff"s alleged right to cancel the agreement was not proved. The defendants aver that, the evidence led by the plaintiff was fraught with glaring inconsistencies and unacceptable variance with the plaintiffs' pleaded case.

The plaintiff's are opposing the application for absolution from the instance. The plaintiffs' aver that taking into account the applicable law, and evaluating all the evidence adduced on behalf of the plaintiffs, the pleadings field of record, the exhibits and all the discovered documents as well as the *viva voce* evidence, the application for absolution from the instance is unsustainable and ought to fail with costs. The plaintiffs aver that they have established a *prima facie* case of breach of contract and the plaintiffs' right to cancel the contract as a result of such breach. The plaintiffs alleged that the application for absolution from the

instance is premised on a misinterpretation of the terms of the agreement of sale as amended and a misconception of the consequences at law of the defendants' failure to pay the full purchase price after they were called upon to remedy their breach.

**The factual background**

On the 25th January 2006 the parties entered into an agreement of sale in terms of which the plaintiffs sold to the defendants an immovable property for the agreed price of Z$11,5 billion, subject to certain terms and conditions as set out in the agreement. The plaintiffs alleged that the defendants breached the agreement by failing to pay the purchase price in full despite the extension of time to pay by the 28th February 2006 in terms of an addendum to the agreement of sale signed on the 16th February 2006. The defendants deny having breached the agreement of sale and state that they have paid the purchase price in full. They aver that the Capital Gains Tax was paid to plaintiffs' legal practitioners, who incidentally were also defendants' legal practitioners at the relevant time in accordance with the agreement of sale.The joint pre-trial-conference memorandum filed by the parties' legal practitioners set out the following issues for trial.

1. Whether defendants are in breach of contract
2. Whether plaintiffs' cancellation of the agreement of sale was in terms of the Contractual Penalties Act (Chapter 8:04)
3. Whether plaintiffs' attempted to restitute the amount paid by defendants towards 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 the issues.

**The pleadings and burden of proof**

This being a cause based on breach of contract the onus of proof rests on the plaintiff to prove breach and the nature thereof. The plaintiffs not only have to allege breach in sufficiently

clear terms in their pleadings, but also to prove such breach in evidence. In their pleadings the plaintiffs allege breach in the following respects:

(a) failure by defendants to pay a balance of Z$1,2 billion
(b) failure by the defendants to pay the sum of Z$2,3 billion to the conveyancers
The breach as alleged is mentioned in paragraphs 4, 5, 6, 7 and 9 of the declaration.

(c) failure to pay interest in the sum of Z$54 208 814.

In their plea the defendants denied breaching the terms of the agreement and contend that they have complied fully with the agreement of sale.

**Assessment of evidence**

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 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 the evidence of the second plaintiff 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 noted 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 question elicited new evidence from the witness. The following exchange occurred between the first plaintiff and the defendants' legal practitioners.

"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' evidence was that he and not the second plaintiff and not him and the second plaintiff is the registered owner of the property. The witness under cross-examination, suddenly wept copiously in court. He then informed the court that he and his father had worked hard to acquire the building at issue. He indicated that it was not proper for the property, to "*just go like that".* The witness asked the court for a *"goodjudgment".* The first plaintiff certainly displayed his emotions in a rather exaggerated manner.

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 of sale 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 price was set by him at an equivalent of US$120 000 which was a reasonable price and acceptable to him at the time. The second plaintiff accepted that the midrate only changed between 25th and 3rd March 2006. The suggestion that the purchase price was eroded by the slide of the Zimbabwean dollar in a period of twomonths, is baseless. The second plaintiff confirmed that he signed both the agreement of sale and the addendum and he signed both in his own name, and on behalf of first plaintiff. This is evident from an examination of both documents. Second plaintiff testified that he co-owns the building with the first plaintiff. The witness testified that defendants failed to pay the purchase price by the 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 stated further that upon chasing the defendants he reached no 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 the 28th February 2006 to settle the balance. By 28th February, the defendants had not paid the entire purchase price. He then approached his lawyers who issued a notice to remedy the breach. By the time the notice and demand was issued, the defendants had paid a total of Z$9,2 billion. Such payments were recorded and agreed by the parties prior to 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, to the nominated conveyancers, Ben Baron & Partners. The witness repeatedly disputed that the figure of Z$2.3 billion as the amount 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 his 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 the addendum in material respects. One glaring contradiction is that the witness sought to argue that that capital gains tax was not, contrary to clause 4.5 of the agreement of sale, and contrary to the wording of the notice and demand written by his legal practitioners, and the pleadings on record, 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 in his 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 defendant:

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

(b) Z$2,3 billion in various instalments to Joel Pincus, Konson and Wolhuter

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

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

**Sufficiency of evidence at the close of plaintiff"s case**

The defendants argue that at the close of the plaintiff"s case the plaintiffs failed to lead evidence upon which a court might return a judgment in their favour. The plaintiffs, however do not agree. The plaintiffs urge the court to dismiss the application for absolution from the instance as it is wholly without merit. The plaintiffs argue that they have made a *prima facie* case for breach of contract, entitling them to cancel the agreement of sale. Further, it is alleged by plaintiffs that there is abundant evidence upon which a court, directing its mind reasonably to such evidence could or might find for the plaintiffs.

I shall examine the sufficiency or otherwise of the evidence presented by plaintiffs at the close of their case. Firstly, the breach of contract pleaded by the plaintiffs was not proved. In his evidence, the second plaintiff could not explain how the sum of Z$1,2 billion which was stated in his pleadings, and which defendants were said had failed to pay was calculated or arrived at. The defendants are alleged to have failed to pay such amount in plaintiffs' pleadings. That plaintiffs relied on the defendants' failure to pay that amount is clear from plaintiffs' declaration, which states in paragraph 4 as follows:

> *"In breach of the aforesaid terms of the agreement, defendants only paid the plaintiffs' the amounts detailed in annexure 'B' hereto, leaving a balance of $1 200 000 000 plus accumulated interest on all outstanding amount."*

The obligation to pay the sum of Z$1,2 billion, which was termed a material breach was not proved nor explained by the plaintiffs at all.

Secondly, in their pleadings, the plaintiffs based their allegations of breach of contract upon the alleged failure by the defendants to pay the sum of Z$2,3 billion in respect of Capital Gains Tax on time and as provided under the agreement of sale. In his evidence, the second plaintiff conceded that after payment of Z$9,2 billion into the second plaintiff's account, the defendants met with a MrLunat, the plaintiff's accountant and enquired about the plaintiff's representation at Ben Baron& Partners. What was admittedhowever, was that when the defendants intendedto pay the Capital Gains Tax, plaintiffs had no file or account at the nominated conveyancers. It was therefore not possible for the defendants to pay the amount at the offices of the seller"s nominated conveyancers. In the event, the plaintiffs cannot be allowed to rely on the delay in payment of Capital Gains Tax. To the so would be tantamount to allowing the plaintiffs tobenefit from their own tardiness or wrongdoing which is not permissible at law.

Thirdly, the plaintiffs according to their own admission were in breach of the contract. Under cross-examination, the second plaintiff conceded that the plaintiffs were in breach of clause 4.7 of the agreement of sale which provides as follows:

> "*Upon signing of this agreement the sellers shall furnish the conveyancers herein with an irrevocable power of attorney authorising them to do all such things and sign all such papers as might be necessary to give effect to the transfer."*

The plaintiffs, having breached the terms of the agreement of sale, which breach occurred prior to the alleged breach by the defendants ought not to be permitted to profit from such breach. See *Chioza* v *Siziba* SC-4-15 where the Supreme Court held that:

> *"It will seem quite clear that the appellant seeks to benefit unjustly from the transaction. Having sold the property and received the proceeds through his agent, he now seeks the return of the property and thus, so to speak "have his cake and eat it". The respondent, on the other hand, has parted with the full value of the property and stands to incur great financial prejudice if an order for eviction is granted in terms of the counter claim. It would appear then, that the court a quo was correct in its finding that the appellant sought to benefit from its own wrongdoing …."*

In this instance, the plaintiffs admittedly received the full market value of the property, as set out and accepted by them as at the time of the sale. I make the observation that the plaintiffs ensured that the fluctuating Zimbabwean dollar was pegged at the mid-rate of the United States dollar at the relevant time. The plaintiffs received the full purchase price for the property.

It is crucial to note that the addendum to the agreement of sale provided for a punitive rate of interest of 800% for any late payment. The second plaintiff, under re-examination, sought to clarify his case on the alleged breach. He stated that there were various instances of breach, the first occurring on the failure to pay by the 27th January 2006, the second one by failure to pay by the 28th February 2006 following the delivery of the demand. The plaintiffs' evidence was clearly at variance with the pleaded cause of action. The evidence was also contrary to any correct reading of the addendum. Under re-examination second plaintiff stated that by the end of the notice period only Z$9,2 billion had been paid to him out of Z$11,5 billion. The defendants had indeed paid the total amount, exclusive of Capital Gains Tax. The witness made reference to a failure to pay Z$10 billion by the 27th January 2006. This argument presents an inconsistency in the contract of sale. Under clause 4.2 and 4.3 a total of Z$10 billion was to be paid into an account nominated by the sellers. This account turned out to be the seller's personal account. In terms of clause 4.4 of the agreement the last payment of Z$1,5 billion was only to be made upon the buyers obtaining occupation. The second plaintiff could not state when occupation was taken by the defendants, but conceded that this could not have been in November 2006. No interest, therefore, would have become due and payable before the last payment of Z$1.5 billion became due. Clause 4.5 inconsistently required that the amount required for Capital Gains Tax was to be held by the conveyancers. The pleadings allege that this amount was Z$2,3 billion. Given the amount, it becomes difficult to determine how the defendants could be said to have failed to pay Z$10 billion to the second plaintiff. The amount, less the Z$2,3 billon came to Z$9,2 billion

which was admittedly paid to the plaintiffs. The second plaintiff conceded that the agreement of sale was drafted by himself.

It follows that the second plaintiff is the *proferens* in this matter, therefore by operation of the *contra proferentem* sale, any obscurity, vagueness and lack of clarity around the issue of what clause was breached must be resolved against the plaintiffs see *Blumo Trading (Pvt) Ltd* v *Nelmah Milling Co and Anor* HH-39-11.

In concluding the analysis of the evidence led by the plaintiffs, I find that the plaintiffs' evidence fell far short of establishing a *prima facie* case for breach of contract. The plaintiffs' evidence was so discredited under cross-examination that no reasonable court examining the evidence could or might find in its favour. The plaintiffs' pleaded case contradicted the *viva voce* evidence in material respects. The alleged breach was not established. The second plaintiff departed from the pleaded case in several respects. His evidence is not reliable. By choosing to extend the true limits, and signing an addendum to provide expressly for penalties for late payment and not reserving the right to cancel the agreement of sale, the plaintiff exercised an election to remain in the agreement and to receive the full market value for the property. There is sufficient evidence that the plaintiffs received in full the value of the property at the relevant time, pegged against the United States midrate at the time. The plaintiff is attempting to have his cake and eat it at the same time.

**The law applicable**

One ofthe leading case law authority in this jurisdiction on the test to be applied when deciding whether to grant an application for absolution from the instance at the close of the plaintiffs' case is *United Air Charters (Pvt) Ltd* v *Jarman*1994 (2) ZLR 341 where GUBBAY CJ, stated as follows at page 343.

> *"The test in deciding an application for absolution from the instance is well settled in the jurisdiction. A plaintiff will successfully withstand such an application, if at the close of his case, there is evidence upon which a court, directing its mind reasonably to such evidence, could or might (not should or ought to) find for him .... Moreover, in considering an application for absolution, the court should lean favour of continuing the case rather the dismissing it ..."*

See ;*Claude Neon Lights (SA) Ltd* v *Daniel* 1976 (4) SA 403 (AD) and *Manyange*v *Mpofu&Ors*2011 (2) ZLR 87 (H).

The test to be applied in this instance is whether at the close of the plaintiffs' case there is any evidence, upon which the court directing its mind reasonably to such evidence could or might find favour of the plaintiffs. The court must also examine whether the plaintiff has failed to adduce any evidence or adduced insufficient evidence to establish an essential element of the claim. The court is enjoined to make an overall assessment of all the evidence adduced on behalf of the plaintiffs and the pleadings filed of record together with exhibits and annexures, as well as *viva voce* evidence to establish whether the evidence is sufficient to proceed to hear the case for the defendants.

I am satisfied, that in applying the applicable law to the facts of this dispute, it becomes evident that the plaintiff's case is full of glaring inconsistencies and unacceptable variance with the pleadings filed of record. The second plaintiffs' evidence by all accounts was at direct variance with the pleadings. The plaintiffs sought to correct his evidence under re-examination. The net result was that this court concluded that the plaintiffs failed at the close of the plaintiffs' case to establish a prima facie case.

In the result, and accordingly, absolution from the instance is granted. Plaintiffs are ordered to pay costs of suit.

*MessrsMoyo&Nyoni* plaintiffs' legal practitioners
*Lazarus &Sarif* defendants' legal practitioners