MIRIAM SAKUBANI
versus
LAST CHIVANDIRE
and
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
MUSITHU & MUCHAWA JJ
HARARE, 4 December 2023 and 20 September 2024

Civil Appeal

Mr *Makuvatsine*, for the appellant
Mr *B.E Mufadza* for the first respondent

MUSITHU J: This is an appeal against the whole judgment of the Magistrates Court handed down at the Chitungwiza Magistrates Court on 3 March 2023.

The Factual Background

On 6 December 2021, the first respondent as the plaintiff in the court *a quo*, instituted a summons claim against the appellant herein as the first defendant. The second defendant was the second respondent herein. The first respondent sought the following relief in the court *a quo*:

> "WHEREFORE plaintiff prays for judgment as follows:
> a) An order compelling the 1st Defendant to forthwith sign all the papers necessary for cession to pass in favour of the Plaintiff regarding stand 34819 Unit "G", Seke, Chitungwiza failing which the messenger of court shall do so in her place and stead.
> b) An order that the 2nd Defendant shall facilitate the cession contemplated in (1) above.
> c) An order that the 1st Defendant and all persons claiming occupation through her shall vacate occupation of stand 34819 Unit "G", Seke within (7) days of the grant of this order failing which they shall be evicted.
> d) An order that the 1st Defendant shall pay US$250.00 or local currency equivalent as damages for her continued occupation of stand 34819 Unit "G", Seke such damages accruing from 1st February 2021 up to the date of her vacation or eviction.
> e) An order that prescribed interest shall accrue on the above amounts, firstly, from date of summons and subsequently on a month-to-month basis until fully paid.
>
> **ALTERNATIVELY,**
>
> f) An order confirming cancellation of the parties' agreement of sale relating to stand 34819 Unit 'G' Seke. **CONSEQUENTLY,**
> g) An order directing the 1st Defendant to refund to the Plaintiff a sum of US$11 000,00 or its equivalent in local currency. **ADDITIONALLY,**
> h) An order directing the 1st Defendant to pay consequential damages amounting to US$20 000, 00 or its equivalency in local currency.

i) An order directing the 1st Defendant to pay prescribed interest on the sums above from the date of summons to the date of full payment. **AND IN ANY EVENT,**

j) An order of punitive costs against the 1st Defendant."

The factual background to the claim is as follows. The appellant is the holder of rights, title and interest in an immovable property known as 34819 Unit 'G' Seke, Chitungwiza (the property). In December 2020, the appellant entered into an agreement of sale with the first respondent in terms of which she sold her rights in the property to the latter. The first respondent complied with all his obligations in terms of the said agreement and demanded cession of rights in the property into his name. The appellant was initially cooperative, but subsequently turned hostile. She refused to effect cession of the property to the first respondent.

The first respondent averred that there was no legal basis for the appellant to remain in occupation of the property. In terms of the parties' agreement, the first respondent was entitled to immediate occupation of the property following payment of the full purchase price. Despite the payment of the full purchase price, the appellant had refused to surrender occupation of the property to the first respondent. The first respondent claimed that by refusing to surrender occupation of the property, the appellant had denied the first respondent rental income at the rate of US$250.00 (or its equivalent in local currency), from 1 January 2021.

In the alternative, the first respondent further averred **that** the failure to pass title in the property would translate to an automatic cancellation of the parties' agreement of sale. In the event of the cancellation of the agreement, the first **respondent** claimed the reimbursement of the sum of US$11, 000.00 or its equivalent in local currency. The applicant also sought consequential damages or the local currency equivalent as at the time the claim was instituted.

In her plea, which was strangely labelled *"Court Application for Rescission of Judgment"*, the appellant denied that there was ever an agreement of sale between her and the first respondent. The absence of a purchase price meant that the purported agreement of sale was a barter trade agreement.

According to the appellant, the first respondent provided his vehicle as surety for a loan that was advanced to the appellant. In return, the first respondent was either to get his motor vehicle back after the repayment of the loan or to be paid a cash sum to be agreed upon between the parties. To secure his position, the first **respondent** prepared the agreement of sale that he was now seeking to enforce. The appellant claimed to have just signed the agreement of sale for convenience as she wanted to secure the loan at the material time. The appellant also

claimed that as a married woman, she could not have sold the house without introducing her husband to the first respondent.

The appellant further averred that the said obligations that the first respondent claimed to have complied with were to secure his motor vehicle which he had surrendered as part of the transaction. The alleged cession was initiated by the first respondent in a bid to enforce an illegality. The papers that were produced by the first respondent as proof of the cession process were not signed. There was no basis to claim a cession as the alleged agreement of sale was a nullity. There was no purchase price to talk about as the property was never sold.

The appellant dismissed the first respondent's claims for eviction and rental income as there was never a sale between the parties. The appellant also dismissed the first respondent's claim for cancellation of the agreement of sale and consequential damages insisting that there was no valid agreement in terms of which those claims could be sustained.

Proceedings in the court *a quo*

The matter was referred to trial on the following agreed pre-trial conference issues:

- Is the first defendant liable anyhow to cede her rights in favour of the plaintiff in regard to stand 34819 Unit "G", Seke? If so,
- Is the second defendant liable to be evicted therefrom?
- How much in holding over damages is the 1st defendant liable to pay, if at all, for its continued occupation of stand 34819 Unit "G", Seke?
- What is the amount of liability against the 1st Defendant in the event that the Plaintiff does not achieve cession relating to stand 34819 Unit "G", Seke?

Three witnesses gave evidence in support of the first respondent's claim. The first witness was the first respondent himself. His evidence was that he was approached by the appellant who was selling the property as she was in urgent need of money. He offered her a motor vehicle, being a Toyota Hilux D4D, which was valued at US$8 000.00. He added a further sum of US$3 000.00, to bring the total purchase price of the property to US$11, 000.00. The cession process was commenced with the appellant even signing a power of attorney agreeing to the process being done on her behalf. The completion of the process was hampered by the Covid 19 restrictions, but when those restrictions were eased, the appellant refused to complete the process.

The second witness was an employee of the second respondent. He explained the cession process and further advised that only a registered holder of rights, title and interest was

allowed to complete the cession process. The last witness was one Ambition Mberikunashe who claimed to have purchased the property from the first respondent. He went to view the property and met the appellant there. He also claimed to have visited the offices of the second respondent together with the appellant to peruse the property file. He only entered into an agreement of sale with the first respondent on being assured by the appellant that she indeed sold the property to the first respondent.

The appellant was the sole witness in her own case. She denied selling the property to the first respondent. She claimed to have approached the first respondent for a car to use as collateral to secure a loan. The parties agreed that the appellant would in turn give the first respondent a token of appreciation for his assistance. The parties only signed an agreement of sale after the first respondent insisted on some form of security in case he failed to get his car back. The appellant secured the loan but failed to repay it leading to the sale of the first respondent's vehicle to satisfy that debt.

Ruling of the court *a quo*

The first issue was whether the appellant was liable to cede her rights, title and interest in the property in favour of the first respondent. In its analysis of the evidence the court *a quo* determined that the appellant gave conflicting accounts of the circumstances surrounding the signing of the agreement of sale with the first respondent. In one instance, she averred that she was pressured to sign the agreement after threats were made to inform her husband about what she had done. In the second instance, she averred that their agreement was written on a piece of paper which was allegedly altered by the first respondent's legal practitioners.

The court *a quo* found her overall account unsatisfactory and determined that based on the parole evidence rule and the *caveat subscriptor* principle, the appellant had bound herself to her agreement with the first respondent. The court also established that the appellant had almost completed the cession process before she made an about turn. She claimed that she had commenced the cession process because she wanted to check the arrears on her property. The court also found that explanation unsatisfactory. The court found in favour of the first respondent and stated that:

> "The first defendant sold her house to the plaintiff and even proceeded to cede rights to him but however did not complete the cession process upon realisation of what she had done and fear of her husband hoping to cancel the agreement. The 1st defendant is liable to cede rights to the plaintiff as he legally bought the property in question and the contract has not been cancelled in any way it is still extant."

The next issue was whether the first respondent could evict the appellant from the property. Having found that the agreement between the parties remained extant, the court determined that the appellant had effectively relinquished her rights in the property to the first respondent, and she was liable to eviction. The court further determined that as the owner of the property, the first respondent had the right to evict anyone who remained in occupation of her property without his consent.

The next issue concerned the quantum of holding over damages. The court determined that because the appellant refused to give the first respondent vacant possession of the property, having surrendered her title, she had to be treated as a tenant. When asked how much rentals she would have earned from the property per month, she had volunteered a figure of US$350.00. The court found the amount of US$200.00 claimed by the first respondent reasonable under the circumstances.

The last issue concerned the quantum of damages, in the event that the agreement of sale was cancelled. The claim for consequential damages was premised on the argument that the property had appreciated in value over time, and during that time the first respondent was not enjoying the fruits of his own property. A valuation report placed before the court showed the present market value to be US$34, 000.00, which the appellant confirmed to be the current open market value. The court proceeded to grant the first respondent's claim as per the summons.

Proceedings before this court

Aggrieved by the decision of the court *aquo*, the appellant approached this court on appeal on the following grounds of appeal:

"1. The court *a quo* erred in making a finding that there was a valid agreement of sale between the appellant and the first respondent by relying on evidence of what transpired after the agreement is alleged to have been entered into without hearing evidence from those who were alleged to have prepared and had been present when the agreement was entered into.
2. The court *a quo* misdirected itself in that after making a finding that the agreement of sale between the appellant and the first respondent is valid, it did not interpret the provisions of the agreement of sale relating to specific performance, breach and cancellation as it would have resulted in it not making a finding and granting the order as it did.
3. The court erred in making an order that the appellant has the option to cancel the agreement, reimburse the plaintiff his money and also pay him the consequential damages being claimed in the Summons without giving reasons justifying the award of damages as claimed since the damages are calculated on the day the debt becomes due.
4. The court a quo erred in awarding costs without taking into account that the appellant was justified in defending the action as there was merit in doing so."

Based on the above grounds of appeal, the appellant sought the setting aside of the judgment of the court *a quo*, and its substitution with an order declaring invalid the agreement of sale between the parties. The appellant also sought a declaration of invalidity of the order for specific performance granted by the court *a quo*.

Submissions and analysis of the preliminary points

On the day of the hearing, counsel for the appellants raised two preliminary points that had not been raised in the papers. The first was that the lower court did not have the monetary jurisdiction to entertain the first respondent's claim. The second related point was that the court *a quo* had no jurisdiction to entertain a claim that was pegged in United States dollars. We postponed the matter to allow counsel to file supplementary submissions dealing with these points of law.

A point of law which goes to the root of the matter can be raised at any stage of the proceedings even on appeal, provided it is not one that is required by law to be specially pleaded in terms of any law.[1] From our analysis of the two points we determined that there was no requirement that they be specially pleaded as special pleas in terms of any law. They were therefore properly raised before us.

Monetary jurisdiction of the court

Mr *Makuvatsine* for the appellant submitted that the monetary claims exceeded the jurisdiction of the court *a quo*. The Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, Statutory Instrument 227 of 2020, prescribed the monetary jurisdiction of the Magistrates Court to be ZWL$3, 000, 000.00, at the time that the claim was instituted. If the first respondent's main and alternative claims were converted at the prevailing interbank rate at the material time, they would still exceed that prescribed amount.

Mr *Mufadza* for the first respondent argued that the parties submitted themselves to the jurisdiction of the Magistrates Court in terms of clause 9 of the disputed agreement of sale. The monetary jurisdiction of that court did not therefore arise when the parties had agreed to submit to the court's jurisdiction.

We determined that the question of whether the court *a quo* had jurisdiction to entertain the matter was tied to the merits of the dispute. This is because the same agreement

[1] *Muchakata v Netherburn Mine* 1996 (1) ZLR 153 (SC)

that the appellant wanted dismissed as null and void was the same agreement which clothed the Magistrates Court with jurisdiction to hear the matter although the monetary claims exceeded its prescribed monetary jurisdiction. If this court determined that the agreement of sale was valid, then it followed that the lower court also had jurisdiction to hear the matter. If this court determined that the agreement of sale was null and void, then it also followed that the parties would not have submitted themselves to the jurisdiction of the lower court in terms of an agreement that was invalid.

Whether it was competent for the first respondent to frame his claim in United States Dollars

Mr *Makuvatsine* submitted that S.I. 227 of 2020 gazetted the monetary jurisdiction of the Magistrates Court in local currency. Its successor was S.I. 45 of 2023, which pegged the monetary jurisdiction of the Magistrates Court at US$50, 000.00. Counsel averred that the first respondent's claim was not supposed to be denominated in United States dollars because the settling of obligations in foreign currency had been outlawed by S.I. 142 of 2019. That instrument was yet to be repealed. It was further submitted that the legislature intended the court to handle claims in local currency and that explained why no provision had been made for a formula to calculate the exchange rate.

In response, Mr *Mufadza* submitted that there was nothing unlawful about the couching of the claim in United States dollars as there was a provision for the payment of the local currency equivalent at the prevailing interbank rate. Counsel referred to the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic transactions) (Amendment) Regulations, 2020 (S.I. 85 of 2020), which he claimed re-introduced the multicurrency regime. Mr *Mufadza* further submitted that S.I. 227 of 2020 and S.I. 85 of 2020 ought to be read in a manner that yielded convergence as opposed to conflict. Counsel's argument was that S.I 85 of 2020 permitted holders of free funds to pay for goods and services chargeable in Zimbabwean dollars, in foreign currency using their free funds at the ruling rate on the date of payment.

Counsel for the first respondent appeared to have misconstrued the import if S.I. 85 of 2020. That instrument amended the Exchange Control (Exclusive Use of Zimbabwe Dollar for Domestic Transactions) Regulations, 2019, published in Statutory Instrument 212 of 2019. S.I. 212 of 2019 entrenched the exclusive use of the Zimbabwean currency for domestic transactions. Section 3 (1) of that instrument provided that:

> "Subject to section 4, no person who is a party to a domestic transaction shall pay or receive as the price or the value of any consideration payable or receivable in respect of such transaction any currency other than the Zimbabwean dollar."

Section 4 specifically defined those transactions that were excluded from the scope of domestic transactions. Such transactions included those payments statutorily required to be made in foreign currency such as carbon tax for foreign registered vehicles, third party insurance payments for foreign registered vehicles and road access fees for foreign registered vehicles, amongst other transactions that involved foreigners coming into Zimbabwe. Section 2 of that instrument defined domestic transactions for which payments were to be made exclusively in Zimbabwean dollars to include goods and services.

S.I. 85 of 2020 amended S.I. 212 of 2019, by the insertion of s 6 after s 5. The new section permitted persons holding free funds to pay for goods and services in foreign currency, even though such goods would have been paid for in local currency. In terms of s 2(2) of S.I. 212 of 2019, any word or phrase to which a meaning was assigned by the Exchange Control Regulations, S.I. 109 of 1996, bore the same meaning when used in the new regulations. Section 2 of the Exchange Control Regulations defined *'free funds'* to mean *"money which is lawfully held outside Zimbabwe by a Zimbabwean resident, and which was acquired by him otherwise than as the proceeds of any trade, business or other gainful occupation or activity carried on by him in Zimbabwe."*

The same section 2 of the Exchange Control Regulations defined goods to mean *"movable property of any kind, including animals."* The definition of goods therefore excludes an immovable property which happens to be the subject matter of this dispute before us. The Exchange Control Regulations and both S.I. 212 of 2019 and S.I. 85 of 2020 do not define the word 'services'. The Law Insider dictionary defines services to mean *"the performance of work, or the furnishing of labor, time, or effort, or any combination thereof, not involving or connected to the delivery or ownership of a specified end product or goods or a manufacturing process."*[2] It follows therefore that the payment for goods and services using free funds envisaged by S.I. 85 of 2020 did not extend to immovable properties.

The critical issue is whether the S.I. 142 of 2019, precludes the denomination of claims in local currency even though the summons give the debtor a leeway to discharge the

[2] https://www.lawinsider.com/dictionary/service or services

judgment debt in local currency at the prevailing interbank or official rate at the time of payment. Section of S.I. 142 of 2019 states as follows:

> "*Zimbabwe dollar to be the sole currency for legal tender purposes*
> 2. (1) Subject to section 3, with effect from the 24th June, 2019, the British pound, United States dollar, South African rand, Botswana pula and any other foreign currency whatsoever shall no longer be legal tender alongside the Zimbabwe dollar in any transactions in Zimbabwe.
> (2) Accordingly, the Zimbabwe dollar shall, with effect from the 24th June, 2019, but subject to section 3, be the sole legal tender in Zimbabwe in all transactions."

While the S.I. 142 of 2019 established the Zimbabwean dollar as the sole legal tender for domestic transactions it did not outlaw or make it criminal for one to possess foreign currency. If the intention of the legislature was to eliminate even the possession or holding of foreign currency, then it would have stipulated so in the law. Section 3(1) and (2) of S.I. 142 of 2019 exempts certain transactions from the ambit of that law. The exceptions are the opening or operation of foreign currency designated accounts (Nostro FCA accounts) or the requirement to pay customs duties and import or value added tax in foreign currency in respect of such goods as are specified under the relevant tax legislation and the tender of foreign currency in payment for international airline services.

It is common cause that in contractual settings, parties are free to delineate the terms and conditions of their contract including the mode of payment and the currency in which contractual obligations must be discharged. In *Breastplate Service (Private) Limited* v *Cambria Africa PLC*, PATEL JA (as he was then), made the following made the following pertinent observations on S.I. 142 of 2019:

> "To conclude on this aspect, the concept of "legal tender", in its ordinary signification, denotes money or currency in official circulation that must be accepted if offered in payment of a debt. In the realm of contractual relations, what this means is that the debtor is entitled to settle his debt through the medium of legal tender and, conversely, the creditor is obliged to accept that tender. The latter has no choice or latitude in the matter. On the other hand, unless explicitly proscribed by statute……, there is nothing under the common law to preclude the debtor from discharging his debt in any currency or medium of exchange other than the officially designated legal tender, including any foreign currency, so long as the creditor is prepared to accept such payment in settlement of the debt. This arises by virtue of the time-honoured doctrine of freedom of contract which, in my view, remains intact and unimpaired by the provisions of S.I. 142 of 2019."[3] (Underlining for emphasis)

From our reading of the above dictum, our view is that whilst the legislature may have proscribed the use of foreign currencies in domestic transactions, the lawmaker or the

[3] SC 66/20 at pages 13-14

authorities cannot supervise or oversee all the contracts that are entered into between willing parties of full contractual capacity on a daily basis. Put differently, the State cannot seek to regulate private contractual transactions involving private citizens, who while exercising their free wills prescribe payment terms that may not accord with legislated legal tender. The time-honoured principles of freedom of contract and sanctity of contracts are sacrosanct. In the case of *Sabina Altaf Ahmed* v *Joina Development Co (Pvt) Ltd*, MAFUSIRE J also made the following relevant comments on S.I. 142 of 2019:

> "[26] I see nothing in the provisions above that may be construed as to mean that a claim cannot be stated in the currency of the agreement, or that a loss cannot be presented in the value that properly represents it. But I shall not, as urged upon me by the plaintiff, go into a discussion of cases such as *Makwindi Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988 (2) ZLR 482 (SC) and *AMI Zimbabwe (Pvt) Ltd v Casalee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 (S), among others, which held, among other things, that a court order may be expressed in units of foreign currency but convertible to local currency at the date of payment or enforcement of payment. I shall not do that because the monetary dispensation obtaining at the time of such cases is different from the one obtaining now."

We associate ourselves with the views of the learned judge, that parties may denominate their claim in the currency of their agreement. What the court may not do, in our view is to grant judgment in the currency that was proscribed by the law. In other words, while the court may entertain a claim denominated in a foreign currency, it may not go further and grant judgment for purposes of its enforcement in the currency that is outlawed. The court will simply have to order the payment in local currency, of an amount equivalent to the foreign currency obligation as agreed in the contract between the parties at the prevailing official exchange rate at the time payment is made. For purposes of enforcing payment, the successful party will have to contend with a discharge of the debt in local currency.

For the forgoing reasons, we determine that there was nothing irregular in denominating the claim herein in foreign currency, but payable in local currency at the prevailing interbank rate in the event of the court finding in favour of the first respondent.

Submissions and analysis of the grounds of appeal

At the commencement of oral submissions, counsel for the appellant abandoned the first ground of appeal, having conceded that it was not clear and concise. Indeed, that ground of appeal was all muddled up such that the court could not decipher what it is that the appellant intended to convey. We noted though that there was reference to the validity of the agreement between the parties. The abandonment of that ground of appeal meant that the validity of the

agreement was no longer an issue before us. The remaining grounds of appeal were subsequently analysed as follows.

The court *a quo* misdirected itself in that after making a finding that the agreement of sale between the appellant and the first respondent is valid, it did not interpret the provisions of the agreement of sale relating to specific performance, breach and cancellation as it would have resulted in it not making a finding and granting the order as it did.

This ground of appeal was made as an alternative to the first ground of appeal which attacked the validity of the agreement between the parties. Assuming the court found that the agreement was valid, then it was urged to make a finding that the said agreement did not make provision for specific performance as a remedy. The court was supposed to interpret the agreement as it was. The applicant further contended that clause 8 of the agreement regulated what would happen in the event of a default by the seller. The court ended up granting an order not supported by the agreement which it was required to interpret.

In response, counsel for the first respondent submitted that clause 2(c) provided for specific performance in the event of a default. Counsel also referred us to the judgment of *Zivanomoyo* v *Dingani*[4], which he submitted was on all fours with the present matter.

Clause 8 of the agreement which the appellant claimed regulated the question of breach states as follows:

> "DEFAULT BY THE SELLER
> Should the Seller fail to perform any of his obligations in terms of this agreement and continues to be in default upon being given 7 days notice to remedy the default, then the Purchaser shall have the right to cancel this agreement and sue for damages."

It is this clause that the appellant submitted, the court a *quo* failed to interpret and apply properly. The first respondent, as noted referred to clause 2(c) of the agreement as justifying the relief for specific performance. That clause reads as follows:

> "(c) The parties agree that the seller has the right of first refusal to purchase this property back within 7 days from the date of this agreement failing which the purchaser shall transfer the property into his name."

In our view, the inclusion of this buy back clause in the contract, whatever the intention of the parties was, gave the first respondent an election to chose whether to cancel the agreement or to enforce it. In any event, the appellant's argument that the failure by the

[4] HMA 02/19

parties to specifically mention the relief of specific performance did not preclude the first defendant from seeking an order of specific performance. In the *Zivanomoyo* v *Dingani* judgment, MAFUSIRE J made the following apposite remarks:

> "[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 sue for specific performance. This is quite elementary. As long ago as 1912 INNES JA said in *Farmers' Co-operative Society (Reg)* v *Berry* 1912 AD 343, at p 350:
>
> > "*Prima facie* every party to a binding agreement who is ready to carry out his own obligation 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."[5]

The above remarks were made in the context of a similarly worded clause in that matter, which was also an appeal from a decision of a lower court. The seller's argument, as is the case herein, was that the remedy sought by the purchaser was not one contemplated by the agreement of sale between the parties. The views of the court in the *Zivanamoyo* case apply with compelling force in the present matter. The victim of a breach of contract can elect to stand by the contract and seek performance from **the party in default.** Alternatively, he can choose to resile from the contract and claim damages for breach. The party in breach cannot make that election on behalf of the victim, and neither does the defaulting party have that leeway to make such an election. The choice between specific performance and cancellation of the contract with a concomitant claim for damages are common law remedies that are available to the victim of a breach regardless of whether the parties chose to make that specification in their contract.

For the foregoing reasons, we determine that there is no merit in the second ground of appeal, and it is dismissed.

3. **The court erred in making an order that the appellant has the option to cancel the agreement, reimburse the plaintiff his money and also pay him the consequential damages being claimed in the Summons without giving reasons justifying the award of damages as claimed since the damages are calculated on the day the debt becomes due.**

The appellant's submission was simply that the court *a quo* erred in granting consequential damages of US$20, 000.00, without any justification. In her heads of argument, the appellant argued that since the agreement of sale did not give the first respondent the right

[5] At p 3 of the judgment

to sue for specific performance, it also took away his right to sue for damages in respect of the property. The trial court therefore erred in awarding damages relating to the property when the first respondent's right to such damages fell away in the event of a breach. His right to claim damages was limited to the US$11, 000.00 which he allegedly paid as the purchase price.

In response, it was submitted on behalf of the first respondent that once the court determined that there was a valid agreement between the parties, then the right to seek consequential damages was available to the victim of the breach if specific performance was not competent. Such damages were intended to place the first respondent in the position he would have been in had the appellant honoured her obligations under the contract. It was further submitted that the appellant did not contest the value placed on her property, meaning that she admitted to the quantum of damages claimed by the first respondent.

The ground of appeal was poorly prepared making it difficult for the court to appreciate what aspect of the court *a quo's* ruling was being attacked. A reading of the ground of appeal suggests that the decision *a quo* was being impugned for its failure to give reasons for the damages awarded. In the heads of argument, the appellant's argument appeared to be that the absence of a clause permitting the first respondent to sue for specific performance meant that he also forfeited the right to claim consequential damages.

What is clear from the first respondent's claim is that the claim for consequential damages was made in the alternative to the main claim for specific performance and other related claims for eviction and payment of holding over damages. In its ruling, the court a *quo* referred to the valuation report which was placed before which showed that that the value of the property was US$34, 000.00. The defendant also confirmed that valuation of the property as being proper. The record of proceedings captures the following exchanges between the first respondent's counsel and the appellant, as she was being cross examined:

> "Q. How much do you value your house?
> A. 30 000 to 35 000 USD.
> Q. So his claim for US$31 000 is within range?
> A. Yes.
> Q. And if to rent it out how much would you realise?
> A. US$350-00
> Q. So the US$250 that he is claiming as damages is within range?
> A. Yes it is."[6]

[6] Page 55 of the record of proceedings

In our view, the lower court's assessment of damages, based on the valuation report placed before it, and the appellant's own admission cannot be faulted. The mere fact that the agreement of sale did not incorporate a clause on specific performance did not eliminate the first respondent's entitlement to bring a claim for damages as an alternative to the claim for specific performance. We determine that there is no merit in the ground of appeal, and it is accordingly dismissed.

The court *a quo* erred in awarding costs without taking into account that the appellant was justified in defending the action as there was merit in doing so.

The last ground of appeal was concerned with the level at which costs were awarded against the appellant. Costs were awarded to the first respondent on an attorney and client scale. The appellant averred that the lower court erred in granting an order of costs at that level without giving reasons for making that order.

In response, it was submitted that costs were in the discretion of the court, and the court could not be impugned for having exercised its discretion in that regard.

Costs are in the discretion of the court, and this court will only interfere with that exercise of discretion in very exceptional circumstances. Ordinarily, costs follow the event, meaning that the successful party will be entitled to costs on the ordinary scale. In determining the appropriate level of costs, the court considers several factors that include, but are not limited to, the conduct of the parties, and whether a party's claim or defence was frivolous and vexatious that's deserving of censure through an appropriate award of costs on the punitive scale.

A perusal of the record of proceedings shows that the court a *quo* casually referred to the question of costs when it said:

> "….If she feels she doesn't want to evict then her alternative is the cancel the agreement, reimburse the plaintiff his money and also pay him the consequential damages which he claimed in his summons plus costs of suit to avoid an innocent party being abused by another out to unjustly enrich herself." (Underlining for emphasis).

In our view, this is not the kind of explanation that is expected in making an order of costs of this magnitude. In its determination, the court made a finding that there was a likelihood that the appellant would be unjustly enriched if she was not ordered to reimburse the purchase price as well as the payment of consequential damages. That finding alone does not translate to a justification for granting an order of costs on the punitive scale. The court

ought to have made such an order of costs with reference to the conduct of the appellant or some other factors that bore on the merits or demerits of her case relative to the issues that were placed before the court. The court *a quo's* ruling on the question of costs is therefore impeachable and must be interfered with.

Jurisdiction

Earlier on in the judgment, we deferred the issue of jurisdiction to the merits of the case, having determined that a finding on the validity of the agreement had a bearing on whether the court *a quo* had the monetary jurisdiction to hear the matter. As already observed, the appellant's counsel abandoned the first ground of appeal which spoke to the validity of the agreement of sale between the parties. The validity of the agreement of sale therefore ceased to be an issue before us. Clause 9 of the agreement of sale dealt with the issue of jurisdiction as follows:

> "….The parties also hereby expressly consent to the Jurisdiction of any Magistrates Court in Zimbabwe."

It is trite that parties can by agreement, submit to the jurisdiction of the Magistrates Court even if their monetary claims far exceed the statutory jurisdiction of that court. This is what happened in *casu*. The first respondent's claim, even when converted to local currency at the prevailing exchange rate at the time of the issuing of summons, exceeded the monetary jurisdiction of the lower court. That however is of no moment after the parties chose to submit themselves to the jurisdiction of the Magistrates Court. The matter was therefore properly before that court.

Conclusion

The decision of the court a *quo* cannot be faulted save for the order of costs. The court a *quo* granted both the main and the alternative relief. From our reading of the record of proceedings and after hearing submissions by counsel, we determine that the first respondent managed to prove its case on a balance of probabilities thus entitling it to either the main relief or the alternative relieve. The orders sounding in money must however be amended to reflect the correct position of the law that this court cannot grant judgment or an order that sounds in United States dollars, save for those exceptional cases where the law permits that financial obligations ought to be discharged in foreign currency.

It is accordingly ordered that:

1. The appeal is partially allowed with no order as to costs in respect of the ground of appeal number four pertaining to the award of costs against the appellant on the legal practitioner and client scale.
2. The appeal is dismissed with costs on the remaining grounds of appeal number two and three.
3. The judgment of the court *a quo* be and is hereby varied as follows:

3.1 By the deletion of paragraph (d) of the operative order and its substitution with the following:

> "(d) the first defendant shall pay an amount equivalent to US$250.00 in local currency calculated at the prevailing interbank rate on the date of payment as damages for her continued occupation of stand 34819 Unit 'G' Seke, such damages accruing from 1st February 2021 up to the date of her vacation or eviction."

3.2 By the deletion of paragraph (g) of the operative order and its substitution with the following:

> "(g) the first defendant shall refund to the Plaintiff a sum equivalent to US$11, 000.00 in local currency calculated at the prevailing interbank rate on the date of payment. **ADDITIONALLY**,

3.3 By the deletion of paragraph (h) of the operative order and its substitution with the following:

> "(h) the first defendant shall pay consequential damages equivalent to US$20 000,00 in local currency calculated at the prevailing interbank rate on the date of payment."

4. By the deletion of paragraph (j) of the operative order, and its substitution with the following:

> "(j) The first defendant shall pay the plaintiff's costs of suit on the ordinary scale."

MUSITHU J: ……..

MUCHAWA J: ……**Agrees**

Machaya & Associates, appellant's legal practitioners
Mufadza & Associates, first respondent's legal practitioners