BINDURA UNIVERSITY OF SCIENCE EDUCATION
versus
AMTEC (PRIVATE) LIMITED t/a AMTEC MOTORS

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
HARARE 31 October 2024 & 27 November 2024

Special case in terms of r 52 of the High Court Rules, 2021

M V Vhera for the plaintiff
Ms R Chikwengo for the defendant

DUBE-BANDA J:

[1] This is a special case in terms of 52 of the High Court Rules, 2021. On 26 November 2018 the plaintiff sued out a summons seeking an order to compel the defendant to deliver to it a Nissan Urvan NV 350 2.5 litre diesel, manual transmission, 16-seater minibus with air conditioning ("vehicle"). The action is defended.

FACTUAL BACKGROUND

[2] The background of the matter is that the plaintiff filed a claim arising from an of agreement executed on 28 June 2018. According to the declaration, in terms of the agreement the defendant sold to the plaintiff a vehicle at a purchase price of USD$63 000.00. The vehicle was to be delivered immediately or within four to six weeks, and payment was due on delivery. Further, the plaintiff pleaded that at the defendant's instance the parties agreed to, and did vary the terms of the agreement by including the air conditioning into the vehicle package, thus varying upwards the purchase price by $2000.00 to a total of $65 000.00. The vehicle was said to be in stock and available for immediate delivery. On 1 October 2018 the plaintiff paid the purchase price. Notwithstanding the full payment of the purchase price, the defendant did not deliver the vehicle prompting the plaintiff to sue for specific performance.

[3] The action was defended and the defendant filed a plea in which it averred that the contract was terminated when the parties negotiated another contract for the sale and purchase of a different vehicle with different specifications for the price of USD$65 000.00. The new agreement was said not to have been signed by the parties as required by the tender procedures. Therefore, it was averred that there was no basis for the claim. It was further pleaded that the plaintiff was reimbursed the full amount and withheld it. Further, it was pleaded that the claim

for specific performance is bad at law and in fact in that the agreement relied on was terminated on 28 September 2018 by effluxion of time as provided for in Clause 14 of the agreement. The contract was terminated and was not renewed. The defendant sought the dismissal of the action with costs of suit on a scale of legal practitioner and client. The plaintiff filed a replication and disputed that the parties negotiated a new agreement of sale, but merely varied the terms of the existing agreement. It was further disputed that the agreement was terminated on 28 September 2018.

[4] On 28 July 2022 a pretrial conference was held before a judge, and the matter was referred to trial on the following issues: whether or not there is an existing contract between the parties; whether or not the initial contract was terminated when the parties negotiated a new contract meant to replace the initial contract; whether or not the plaintiff complied with the terms of the sale agreement; and whether or not the plaintiff is entitled to specific performance. The plaintiff made an admission that the amount of USD$65 000.00, which was the contract value, paid to the defendant on 1 October 2018 was returned to it on 2 October 2018.

[5] The matter was set down for trial for 19 June 2013, and when the trial was about to commence the parties agreed that the facts on which this matter turns were common cause. Leave was then sought to proceed by way of a special case ("stated case") in terms of r 52 of the High Court Rules, 2021. The court acceded to this request and the matter proceeded by way of a stated case.

<u>SPECIAL CASE</u>

[6] A special case is provided for in r 52 of the High Court Rules, 2021, it provides the procedure to be followed in such a case. It says:

> "(1) The parties to any civil action or suit may, after summons been issued, agree upon a written statement of facts or the questions of law arising therein in the form of a special case for the adjudication or opinion of the court.
> (2) The statement referred to in subrule (1) shall set out the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon.
> ……………………….
> (10) If the question in dispute is one of law, and the parties are agreed upon the facts, the facts may be admitted and recorded at the trial and the court may give judgment without hearing evidence."

[7] It is clear that the procedure provided for in r 52 is available to parties to a civil dispute, and it is available when there is no dispute on the facts, and the parties agree on the undisputed facts. It is meant for situations where only questions of law are in contention. See *Leathout*

Investments (Private) Limited v Muvirimi & Anor SC 60/21. In *Kunonga v The Church of the Province of Central Africa* SC 25/17 at para 14 and 17 the court held that:

> "The rules of court of most countries make provision for the reference of a matter as a stated case. But what is a stated case? It is a case that is brought upon the agreement of the parties who submit a statement of undisputed facts to the court but who take adversarial positions as to the legal ramifications of the facts, thereby requiring a judge to decide the question of law presented (*Legal dictionary. The free dictionary.com*). Put another way, it is a formal written statement of the facts in a case, which is submitted to the court by the parties, jointly, so that a decision may be rendered without trial. The facts being thus ascertained, it is left for the court to decide the question of law presented. A stated case is also called a special case, an amicable action, a case agreed or a friendly suit (*US Legal, Inc*.)
> Once the facts are agreed, the court should proceed to determine the particular question of law that arises and not delve into the correctness or otherwise of the facts. It is bound to take those facts as correctly representing the agreed position and to thereafter determine any issues of law that may arise therefrom. It is not open to the parties to the stated case to seek to re-open the agreed factual position or to contradict such position. Nor can either party seek to ignore existing legal principle or findings of fact made in connection with the same matter by another court. Of course either party has a remedy at common law, to withdraw any concession made in a stated case owing to *justus error*, fraud, mistake, or any other valid ground."

[8] In compliance with the rule and the jurisprudence developed by the superior courts, the parties filed a document termed a statement of agreed facts. The statement reads as follows:

<u>Statement of Agreed Facts</u>

i. At the commencement of trial held on the 19th of June 2023 before the Honourable Justice Mafusire, the parties in this matter requested that they proceed with the matter as a stated case. This request was made because the parties are of the genuine view that the facts of this matter are common cause, the dispute is purely legal and there is no need for leading of oral evidence. What is in issue are questions of law. Leave was thus granted to the parties to have the matter dealt with as a stated case.

ii. The Parties are therefore filing this statement of agreed facts in motivation and pursuit of the stated case.

<u>Agreed facts</u>

iii. The parties entered into a memorandum of agreement on 28 June 2018 for the purchase of a Nissan Urvan NV 350, 2.5l diesel, manual transmission 16-seater minibus (hereinafter referred to as "the bus"). The agreement had the following crucial terms:

   a. the purchase price for the bus was US$63 000.00 (Clause 2 of the Agreement);
   b. delivery would be made immediately or within four-six weeks period (Clause 5 of the Agreement);
   c. payment would be made upon delivery (Clause 11 of the Agreement);

d. the duration of the contract was from the date of signing of the contract, that is the 28th of June 2018 to 28th of September 2018 (Clause 14 of the Agreement).

iv. Later, on 20 September 2018 the defendant advised the plaintiff that it was to supply the plaintiff with an upgraded version of the bus. The defendant advised the plaintiff that this bus was available and the parties varied the terms of this contract by:

a. including air-conditioning into the vehicle package of the bus; and

b. varying upwards the purchase price to US$ 65 000.00 - a revised quotation was made to that effect.

v. On 1 October 2018, the plaintiff proceeded to make payment of the purchase price of US$65 000.00 into the defendant's bank account.

vi. On 2 October 2018, the defendant wrote to the plaintiff indicating that it was having difficulties in sourcing foreign currency which was going to make it longer for the defendant to deliver the bus. The defendant indicated that it therefore wanted to refund the money that it had received from the plaintiff.

vii. On 2 October 2018 defendant refunded the US$ 65 000.00 that had been paid to it by the plaintiff.

viii. The plaintiff, on 26 November 2018, then instituted the present claim for specific performance for delivery of the bus.

Parties' contentions on Questions of law

ix. The plaintiff's contention is that there exists an agreement of sale between the parties, which contract was only varied later on by the defendant which now wanted to supply an upgraded version of the bus. The plaintiff contends that it performed its obligations in terms of the agreement between the parties hence it is entitled to specific performance, that is delivery of the bus that it had contracted for with the defendant.

x. The defendant on the other hand makes the following contentions in defence of plaintiff's claim:

a. The claim for specific performance is bad at law and cannot be sustained as the Contract relied upon was a 3-month fixed term contract which was terminated by the effluxion of time on 28 September 2018.

b. That the claim for specific performance cannot be sustained as plaintiff was refunded and retained the purchase price it had paid to defendant.

c. That the contract between the parties terminated when the parties negotiated another contract for the sale and purchase of a different bus, which had different specifications, for an increased purchase price of US$65 000.00.

Relief sought by the parties

xi. The plaintiff seeks the following relief:-

a. An order that the defendant delivers to the plaintiff a Nissan Urvan NV 350 2.5 litre diesel, manual transmission, 16-seater minibus with air conditioning;

b. Costs of suit at the legal practitioner client scale.

xii. The defendant seeks dismissal of the plaintiff's claim with costs on a higher scale of legal practitioner and client scale.

[9] The agreed facts were admitted and recorded and in the reading of r 52(10) the hearing of evidence was dispersed with. In addition, the parties filed heads of argument articulating and engaging with the agreed facts and the case law.

THE SUBMISSIONS BY THE PARTIES

[10] Ms *Vhera* counsel for the plaintiff in her oral submissions, which mirrored the heads of argument submitted that there is in existence a contract between the parties. That after the sealing of the agreement, the defendant proposed to supply a more advanced vehicle, and the plaintiff agreed and this amounted to a variation of the contract of sale. Counsel argued that it was not correct that the first contract was terminated and the parties entered into a new contract. The parties varied a contract that was in existence, by an additional specification to the vehicle and the increase of the purchase price. The rest of the terms remained the sale, which was the reason no new contract was signed. Counsel argued further that the contract was clear on how it ought to be terminated. The contract was varied and not terminated. Counsel submitted that the plaintiff complied with the agreement of sale, in that on 1 October 2018 it paid the full purchase price in the sum of US$65 000.00.

[11] Counsel argued that the agreement was not terminated by effluxion of time, because it was the defendant who initiated a variation by letter dated 20 September 2018, i.e., eight days before the date the agreement was due to expire. Further, that in its letter dated 2 October 2018, the defendant gave other reasons for its refusal to comply with the agreement, and none of those reasons included the fact that the contract itself had terminated by effluxion of time. In addition, plaintiff argued that defendant by proposing a variation of eight days before the expiration date, meant that the duration of the agreement had to be extended.

[12] The plaintiff submitted further that it was entitled to the remedy of specific performance, in that it had performed its obligations in terms of the agreement by making timeous and full payment of the purchase price. By returning the purchase price, the defendant was repudiating the agreement, and this gave the plaintiff an election to either claim damages or specific performance, the plaintiff chose specific performance. Counsel urged the court to exercise its discretion in favour of specific performance.

[13] The defendant submitted that the agreement upon which the claim for specific performance is based is no longer binding as it expired on 28 September 2018. The agreement had terminated by effluxion of time. It was contended further that the plaintiff was in breach of the agreement in that it paid the purchase price out of time, and on an expired agreement, and as such it is not entitled to the remedy of specific performance. It was submitted that at law the plaintiff cannot seek specific performance without tendering the purchase price. Ms *Chikwengo* counsel for the defendant submitted that an order of specific performance lies in the discretion of the court. An order of specific performance without a tender of the purchase price will unjustly enrich the plaintiff. In conclusion, counsel submitted that specific performance is ordered in circumstances where a binding contract exists; a party who claims specific performance must have performed his own obligations under the agreement or must tender full performance; and a party who is in breach cannot seek specific performance. Counsel submitted that in exercising its discretion, the court is enjoined to prevent an injustice and to do simple justice between man and man. Counsel sought that the claim be dismissed with costs.

[14] Ms *Chikwengo* submitted that the parties having agreed on the common cause facts, it was not competent for either of the parties to re-open the facts and revisit the issues for trial as per the pre-trial conference minute. Because at that stage the facts were contentious. Counsel criticised paragraphs 1 – 18 of the plaintiff's heads of argument on the basis that they deal and re-open the facts prior to the signing of the statement of agreed facts. I agree. In this case Ms *Vhera* kept drifting away from the facts as agreed in the stated case. In addition, counsel kept referring to the issues as formulated at the pre-trial, drifting away from the issues in the stated case. Such is impermissible. It is important to restate the approach to be adopted whenever litigants request a court to invoke r 52 and determine the issues by way of a stated case. It is incumbent upon the parties to ensure that the stated case contains adequate facts as agreed upon between them. It is not open to the parties to the stated case to seek to re-open the agreed factual position or to contradict such position. Further, the statement ought to also contain the question of law in dispute between the parties and their contentions regarding these questions of law. As

was stated in *Kunonga v The Church of the Province of Central Africa* SC 25/17 that a party will be kept strictly to the terms of the agreed facts, as it is on the basis of those facts that the court would have been invited to make a determination on some specific question of law.

ISSUES FOR DETERMINATION

[15] Ms *Chikwengo* submitted that the issues of law requiring an answer are no longer as what appears in the joint pre-trial conference minute, but what is contained in the statement of agreed facts. I agree. The first and central issue for determination therefore is whether there is in existence a valid agreement of sale between the parties. The second and corollary issue that arises is whether on the overall facts as stated in the statement of agreed facts, the plaintiff is at law entitled to an order of specific performance.

WHETHER THERE IS A VALID AGREEMENT OF SALE BETWEEN THE PARTIES

[16] In the statement of agreed facts the parties recorded that the duration of the contract was from the date of signing of the contract, that is the 28th of June 2018 to 28th of September 2018 (Clause 14 of the Agreement). The learned author Christie RH in *The Law of Contract in South Africa* (2nd ed) 590 states that when a contract fixes the time for performance *mora* is said to arise from the contract itself (*mora ex re*) and no demand is necessary to place the debtor in mora because, figuratively, the fixed time makes the demand that would otherwise have to be made by the creditor. In *Laws v Rutherfurd* 1924 AD 261 INNES CJ referred to this as the

> "principle which applies when a debtor undertakes to discharge an obligation on a specified date; the creditor need make no demand: *dies interpellat pro homine,* and the debtor is in *mora* if he fails to pay on the appointed date."

[17] In *Tiopaizi v Bulawayo Municipality* 1923 AD 317 at 325 the court stated that if the parties agree upon a definite time for the expiration of the contract, it follows that no notice of termination is required. The contract expires by effluxion of time, and the relationship ceases. If the terms of the contract are clear the principle must be applied no matter how hard the result may be. The court has no power to extend the time fixed by the contract. In *casu* according to the statement of agreed facts, the parties agreed that the duration of the contract was from the date of signing of the contract, that is on 28 June 2018 to 28 September 2018. Therefore, the agreement has a time clause which determines the period within which it would be valid. The time period was specified so that there is no doubt about the duration of the validity of the agreement. The agreement shows that the parties agreed that the obligations flowing from the agreement will have effect during the period between 28 June 2018 to 28 September 2018. In other words, on arrival of 28 September 2018 the obligations were

extinguished or terminated. This is what the parties agreed on and our law, generally, recognises freedom of contract.

[18] Ms *Vhera* argued that the agreement was extended by way of conduct. I do not agree. There is no evidence that the agreement was extended by conduct or implication. The conduct of the defendant does not show that it intended the agreement to continue beyond the time-line provided in Clause 14. I say because plaintiff's payment made on 1 October 2018 was returned on 2 October 2018. In addition, the variations to the agreement were made within the duration of the validity of the agreement. Again, the vehicle had to be delivered within the duration of the validity of the agreement. On the agreed facts of this case, there is no basis for the submission that the defendant intended the validity of the agreement to go beyond 28 September 2018. The agreement did not grant any automatic right of renewal, it expired by the effluxion of time on 28 September 2028. The 28th September 2018 was the final day the agreement was legally binding and enforceable. Once the expiration date has passed, the agreement became null and the parties were no longer obligated to fulfil their commitments. The court has no power to extend the agreement beyond the date agreed by the parties.

[19] The plaintiff submitted that none of those grounds for termination of the agreement provided in Clause 15 were invoked. Clause 15 provides the grounds on which the agreement could be terminated. My understanding is that the agreement provided two avenues on which it could be terminated, i.e., one by effluxion of time in terms of Clause 14, and two on the ground listed in Clause 15. It is therefore important that Clause 15 must be read within the context of the whole agreement, and in particular with Clause 14. Clause 15 could only come into operation during the subsistence of the agreement, e.g. the parties could before expiration of the agreement mutually agree to terminate it, or could be terminated on any ground listed in Clause 15. Clause 15 had no application or relevancy after 28 September 2018 the date agreement expired by effluxion of time.

[20] The agreement terminated by effluxion of time on 28 September 2018, and therefore payment on 1 October 2018 was outside the duration of the validity of the agreement. The defendant was within its rights to return the purchase price to the plaintiff. It matters not what reason the defendant provided in returning the purchase price, the point is that payment was made out of outside the duration of the validity of the agreement. In the circumstances, there is no more valid agreement between the parties.

WHETHER PLAINTIFF IS ENTITLED TO SPECIFIC PERFORMANCE

[21] For completeness, I turn to the issue of specific performance. It is settled law that every party to a binding contract who is ready to carry out its own obligations under it has a right to demand from the other party, so far as it is possible, performance of that other party's obligations in terms of the contract. See *Farmers Co-op Society v Berry* 1912 AD 343 at 350; *Smith & Ors v Zimbabwe Electricity Supply Authority* 2003 (1) ZLR 158 (H) at 158G.

[22] Specific remedy is a discretionary remedy vested in the courts. In the exercise of such discretion, the general rule is that prima facie, every party to a binding agreement who is ready to carry out his own obligations under it has a right to demand the other party, so far as it is possible, to perform its undertaking in terms of the contract. Courts will exercise a discretion in determining whether or not decrees of specific performance will be made. See *Hativagone & Anor v CAG Farms (Pvt) Ltd & Ors* S 42-15 at 16; *Tinglo Investments (Pvt) Ltd v Solomon & Anor* 2020 (1) ZLR 1073 (H). The onus in proving requirements for a specific performance order lies with the plaintiff for that remedy. In exercising its judicial discretion to issue or refuse an order of specific performance, a court must avoid injustice to the parties and consider in the light of the circumstances of the case whether a litigant seeking the remedy has fulfilled its side of the bargain. See *Tinglo Investments (Pvt) Ltd v Solomon & Anor* 2020 (1) ZLR 1073 (H).

[23] *In casu* the plaintiff is seeking an order of specific performance on an agreement of sale that has expired by effluxion of time. This remedy is not available to such a litigant. In addition, a court must exercise its discretion in the light of public policy and in a manner that does not bring about manifest unjust result. In any event, the plaintiff seeks specific performance without even tendering the purchase price. The plaintiff cannot hold on to the purchase price, make no tender of it and still claim specific performance. It matters not that it was once paid and returned to the plaintiff.

[24] Ms *Chikwengo* submitted that if the remedy of specific performance is granted, the plaintiff would be unjustly enriched. I agree. The plaintiff would be unjustly enriched, at the expense of the defendant by having a vehicle without paying for it. The result would be that the plaintiff will have both the vehicle worthy US$65 000.00 and also the purchase price, and the defendant will remain USD$65 000.00 poorer. See *Gamanje (Pvt) Ltd v City of Bulawayo* SC 94/04 at p 8. The submission by Ms *Vhera* that once order is granted, the plaintiff will pay the purchase price is unsustainable, in that it would be for the plaintiff to decide whether to pay or not. In the circumstances, the remedy of specific performance will result in just enrichment of the plaintiff.

COSTS

[25] The plaintiff has failed to obtain the relief it sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. The defendant is entitled to its costs. The defendant sought costs on a legal practitioner and client scale. Such costs are not for the mere asking. Something more underlies the practising of awarding costs on a legal and practitioner scale, than the mere punishment of the losing party. See *Kangai v Netone Cellular (Pvt) Ltd* 2020 (1) ZLR 660 (H). No case has been made for cost in this case. Costs on a party and party scale will meet the justice of the case.

DISPOSITION

[26] The plaintiff seeks the remedy of a specific performance, on the agreed facts it is not entitled to such a remedy for the following reasons, the agreement of sale on which the claim is anchored expired by effluxion of time, and the plaintiff is holding on to the purchase price without tendering the same, and cannot have both the vehicle and the purchase. Plaintiff will have the defendant's vehicle for no value. It matters not that the defendant returned the purchase price, the plaintiff still had to tender it. The plaintiff will be unjust enriched if the order sought is granted. This will bring about a manifest unjust result and grave injustice. It is for these reasons that this case must fail.

In The Result, I Order As Follows:

The plaintiff's case be and is hereby dismissed with costs of suit.

Tamuka Moyo Attorneys, plaintiff's legal practitioners
Chikwengo Law Chambers, defendant's legal practitioners