SPRIYANO INVESTMENTS (PVT) LTD
Versus
ALLIED TIMBERS (PVT) LTD

HIGH COURT OF ZIMBABWE
SIZIBA J
MUTARE, 19 November 2024 & 2 December 2024

CIVIL ACTION

Mr *V. Chinzamba,* for the plaintiff
Mr *A. Rutanhira,* for the defendant

SIZIBA J**:** The plaintiff's prayer as set out in its summons is as follows:

"(a) An Order directing the Defendant to allow the Plaintiff to collect its 1 300 m3 pine logs from the Defendant's field at ***ERIN FOREST*** *in Nyanga or Alternatively payment of the sum of US$58 000.00 being the net value of the timber.*

(b) An Order directing the Defendant to allow the Plaintiff to harvest the timber on the two clusters that they allocated to them or Alternatively pay the sum of US$53 000.00 being the net value of the timber that the Plaintiff would have harvested from the two clusters.

(c) Costs of suit."

The plaintiff alleges that the two parties entered into a written contract whereof the plaintiff bought standing timber from the defendant which was to be cut into logs at agreed four clusters of the defendant's field and transported away by the plaintiff for its use or benefit. There was to be a deposit of US$20 000 which the plaintiff did pay and there was also an agreed rate for the charges on the timber being sold. There was to be a written notice of seven (7) days in the event of any breach by the plaintiff. The contract was to subsist until 30 June 2023. The plaintiff was also obliged to plant twenty hectares with plants which the plaintiff did. There were occasions when the plaintiff was stopped by the defendant to cut timber and it was directed to plant more timber. On 15 May 2023, the plaintiff was stopped again on claims that some investigations were being carried out and the plaintiff was alleged to have caused some variances

on the timber collected and the one paid for which allegedly prejudiced the defendant. The parties finally resolved the stalemate in question and thereafter when the plaintiff wanted to collect the 1 300 m3 logs that it had cut and also to cut timber from the last two clusters that had been allocated it, the defendant refused to allow the plaintiff to collect the 1 300 m3 logs nor to cut the timber on the two clusters alleging that the contract had expired by 30 June 2023 as agreed. The plaintiff alleges that it was never notified of any breach of contract and that the stoppage of its works was unjustified and hence the claims as articulated in its summons.

In its Plea, the defendant admitted most of the allegations in the plaintiff's declaration pertaining to the terms of the contract. It alleged that the plaintiff could not be allowed to continue cutting the timber in the remaining clusters and also that it could not collect the 1 300 m3 logs already cut as the contract between the parties had lapsed or ceased to exist as from 30 June 2023. The defendant also alleged that the plaintiff had been fraudulent in causing a variance in the actual timber collected from its field and the amount paid although it agreed that the dispute was settled by a sum of money that the parties agreed upon and which the plaintiff then paid.

After the pleadings were closed and on 27 August 2024, the parties signed a joint pre - trial memorandum after holding a pre trial conference before a judge in chambers whereupon the issues for trial were agreed as follows:

(a) Whether or not the plaintiff is entitled to the 1 300 m3 of timber logs or their value in the sum of US$58 000.00 or equivalent in Zig.

(b) Whether or not the plaintiff is entitled to harvest the timber on two clusters allocated to it in terms of the agreement or to be paid the value of the timber in the sum of US$53 000.00 or equivalent in Zig.

THE STATED CASE

On the 19 November 2024 being the trial date, the parties signed a stated case in terms of r 52 of the High Court Rules, 2021 whereupon they agreed on the facts and issues of law to be determined by the court after filing of written submissions. The statement of their agreed facts and issues is hereby reproduced hereunder for the sake of clarity.

"A. In Brief

1. *Plaintiff instituted action proceedings seeking specific performance, alternatively damages, in respect of a written contract it concluded with the Defendant on the 5th of November 2022. The Defendant herein denies liability and has put into issue the Plaintiff's entitlement to the relief claimed.*
2. *Each party had opportunity to file their respective Pleadings culminating in the filing of a Joint Pre-Trial Conference Minute on the 18th of September 2024 albeit signed 27 August 2024. [Page 38 of the Record]*
3. *Counsel for the parties, at the urging of the Court, have since agreed that a trial could be curtailed if the matter proceeded as a special case in terms of Rule 52 of the High Court Rules, 2021. They further agreed to engage and concisely state such facts as may be necessary to enable the Court to decide the question of law arising.*
4. *The Court and the parties shall be at the liberty to refer to each other's documents as duly Discovered and the Court shall draw from such facts and documents stated in the special case any inference, whether of fact or law, which might have been drawn therefrom if proved at trial in accordance with Rule 52 (6) of High Court Rules.*
5. *Rule 52 (4) places an obligation on Counsel for Plaintiff to type and print the statement of agreed facts for signature by the other parties and to file the same for use by the Court. The following is the statement of agreed facts.*

B. Statement of Agreed facts and Documents

6. *On the 5th of November 2022 the parties entered into a written agreement wherein the Defendant agreed to sell to the Plaintiff standing timber being approximately 2000 m3 of pine sawlogs and 60 m3 of firewood.*

7. *The aforesaid agreement had clear terms outlining the parties' obligations and procedures attendant to the effectuation of the contract. The agreement concluded inter partes was to subsist from the 5th of November 2022 and automatically terminate, without renewal, on the 30th of June 2023.*

8. *The Plaintiff paid the Deposit and planted trees in terms of the agreement.*

9. *It is common cause that on the 15th of May 2023 the Defendant asked the Plaintiff to immediately suspend the harvest and purchase of timber in order to pave way for investigations as regards variances that had arisen between timber the Plaintiff had extracted and actually paid for. At the aforesaid date the Plaintiff had harvested 1300 pine logs which logs had not been invoiced and collected in terms of the aforementioned agreement.*

10. *In consequence of the investigation referenced above the Plaintiff agreed to pay US $ 1 815.00 to offset the negative variance of 39.3886m3 of logs that the Defendant alleged the Plaintiff had harvested and collected but not paid for.*

11. *On the 3rd of July 2023 the Plaintiff advised Defendant of its intention to resume harvesting, purchasing and collecting timber since the issue of the variance had been resolved inter partes.*

12. *By the 30th of June 2023 the Plaintiff had not completed the harvesting and collection of timber that it had been allocated as available for purchase and extraction in accordance with the parties' written agreement.*

C. Consequently the Court is called on to determine:

i) Whether or not the Plaintiff is entitled to the 1 300m3 of timber logs or their value in the sum of USD$58 000.00 or equivalent in ZiG?

ii) Whether or not the Plaintiff is entitled to harvest timber on two clusters allocated to it in terms of the Agreement or to be paid the value of the timber in the sum of USD 53 000 or equivalent in ZiG?"

SUBMISSIONS BY THE PARTIES

Counsel for the plaintiff submitted that the defendant had no right in terms of the contract or any law to stop the plaintiff from operating or working prior to the expiry of the contract period. Clauses 20, 21 and 23 of the contract outlined what was to happen in the event of a breach. A breach does not automatically terminate a contract. It was further submitted that the failure by the plaintiff to complete the cutting and collection of the timber was solely attributable to the defendant's unlawful unilateral stoppage of the contract. Plaintiff accordingly submitted that the defendant could not be allowed to benefit from its own wrong. It was also plaintiff's submission that the defendant was not entitled to expropriate the timber which the plaintiff had paid for and cut as such would unjustly enrich the defendant. Such timber was already plaintiff's property at law. Accordingly, it was submitted that the plaintiff, having performed its part of the contract, was entitled to specific performance and the damages flowing from defendant's breach of contract.

On the other hand, counsel for the defendant submitted that the plaintiff was not entitled to the 1 300m3 timber logs or their value in the sum of US$58 000 or its equivalent in Zig. It was also submitted that the plaintiff was not entitled to harvest the timber in the two remaining clusters. The defendant's contention was that the plaintiff had not yet been invoiced and he had not yet paid for the timber in question and hence he could not be said to be the owner thereof. It was argued for the defendant that as the parties had agreed that the contract would terminate by effluxion of time on 30 June 2023, the court could not extend such period as such would be contrary to the well-established doctrine of sanctity of contract. Furthermore, it was argued that the plaintiff was not entitled to rely on the stoppage of the work on 15 May 2023 since it agreed to such stoppage without raising any objection and that it also settled the amount of the variance. In any event, it was argued that the parties finished the negotiations on 13 June 2023 but the

plaintiff delayed making payment up to 22 June 2023 and also waited until 3 July to seek a resumption of the work. The defendant accordingly prayed for a dismissal of the plaintiff's claim.

THE LAW AND ITS APPLICATION TO THE CASE AT HAND

In *Zimbabwe Power Company* v *Intratrek Zimbabwe SC 127-23* at p 45 of the cyclostyled judgment, the Supreme Court of Zimbabwe stated the law on specific performance as follows:

> *"The law on specific performance is well traversed. In the case of Grandwell Holdings Pvt Ltd v Zimbabwe Mining Development Corporation & 3 Ors SC 5/20, this Court remarked as follows:*
>
> *'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 all his or her obligations under the contract or is ready, willing and able to perform his 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. See Minister of Public Construction and National Housing v Zescon (Pvt) Ltd 1989 (2) ZLR 311 (s), where at 318G, this Court stated:*
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> > *'The law is clear. This is a remedy to which a party is entitled to as of right. It cannot be withheld arbitrarily or capriciously'".*

Furthermore, in *Mutara* v *Mutopo and Another HH 219-23* at p 6 of the cyclostyled judgment, the court made the following remarks:

> *"Purchase and sale, it is agreed, is a synallagmatic contract. It creates rights and obligations as between the parties. The seller's right is to receive the purchase price. His concomitant obligation is to deliver the thing (merx) to the purchaser. The buyer's duty is to pay the purchase price. His right is to receive delivery of the thing which he purchased.*
>
> *Where, as in casu, Allen has paid the purchase price in full, his right to delivery of the property remains unquestionable. It is for the mentioned reason, if for no other, that Allen filed this application moving me to compel Brian to perform his own side of the contract which the two of them signed. Brian should transfer title in the property to Allen who, in short, is moving for the remedy of specific performance. The remedy is available to a party who has performed, or who stands ready to perform, his part of the contract: Farmers' Corp Society (Reg) v Berry, 1912 AD 343 at 350."*

In this case, the parties are agreed that what the plaintiff is seeking from this court is the remedy of specific performance with an alternative claim of damages. This has been captured in the opening remarks of the statement of their agreed facts. This court has a discretion to grant

such relief upon fulfilment of the conditions or requirements set by the law as articulated above. It is common cause from the agreed facts and also from the written contract that what the parties signed in this case was a contract of sale. Having petitioned this court to be allowed to collect the 1 300m3 pine logs and to also harvest timber in the remaining two clusters, the plaintiff, being the purchaser in terms of the contract, had a burden to demonstrate and prove that it has discharged its contractual obligations by paying the purchase price or value of such timber that it sought to collect or harvest. From the agreed facts and also from all the discovered documents before this court, there is no indication that the plaintiff paid the purchase price for both the 1 300m3 pine logs and the two clusters of standing timber. In fact, what is before the court is an agreement by the parties that the invoicing for the disputed timber was yet to be done. This is clearly captured in the last part of para 9 of the statement of agreed facts as follows:

> "*At the aforesaid date the Plaintiff had harvested 1300 pine logs which logs had not been invoiced and collected in terms of the aforementioned agreement."*

If one could still entertain some doubt on this aspect after reading the above paragraph, then paragraph 11 of the statement of agreed facts should clear away such doubt as it explicitly provides thus:

> *"On the 3rd of July 2023 the Plaintiff advised Defendant of its intention to resume harvesting, purchasing and collecting timber since the issue of the variance had been resolved inter partes."*

The rights and obligations of the parties are clear at law in this contract of sale and moreover, the written contract signed by the parties imposed clear rights and obligations upon them. Clause 2.4 of the contract contains the purchase price for the timber which was agreed at US$40 per cubic metre of pine saw logs before Value Added Tax and US$25 per cubic metre of eucalyptus timber before Value Added Tax. Clause 7.1 of the contract reiterated the same purchase price although it was inclusive of Value Added Tax and such was agreed to be the invoicing price for the timber. Both the statement of agreed facts and the signed contract attest clearly that the plaintiff paid the deposit of US$20 000 which was due before the work could start but from the papers before me, the plaintiff has failed to prove or at least allege having paid for the value of the timber that it seeks to collect or harvest. I agree with the defendant's counsel that the passage of risk to the plaintiff on the disputed timber in terms of clause 9.3 of the contract

does not confer ownership rights to the plaintiff without payment of the purchase price. To hold otherwise would be to substitute or replace the obligation of payment of the purchase price by the purchaser with the passage of risk. The law does not support such a misadventure.

I must say that it would have been a different case had the plaintiff pleaded that it wishes to collect and harvest the disputed timber upon being invoiced by the defendant or against tender of the purchase price to the defendant on the basis that it was frustrated by the defendant from completing its work by being stopped to harvest and purchase timber on the 15 May 2023. Unfortunately, that is not the plaintiff's case. What the plaintiff has pleaded is merely an entitlement to the disputed timber or its value when it has not paid the defendant. To grant such relief would be an injustice to the defendant who has not yet even invoiced the plaintiff for such timber. This is a typical case where a court of law should not exercise its discretion to grant specific performance and by extension, no damages can be awarded and the simple reason for this is that the plaintiff has not fulfilled its part of the bargain. More disturbingly, the plaintiff has not shown that it is ready to perform or fulfil its part of the bargain by being invoiced and made to pay for the value of the disputed timber. Specific performance is granted to a party who complains that he or she has fulfilled his or her part of the contract or that he or she is willing to perform his or her side of the bargain whilst his or her adversary is refusing or failing to perform his or her part. The court will then chip in to order his or her adversary to perform his or her part or pay damages so as to achieve a fair result. What disqualifies the plaintiff in this case is that it has not performed its part and it is not ready to perform it either. The mere breach of contract by the other party does not automatically qualify the plaintiff for the remedy of specific performance or an alternative of damages. To grant relief to the plaintiff under these circumstances would be tantamount to authorising the plaintiff to commit a breach of contract against the defendant as well and it is foreseeable that such misdirection would result in confusion and anarchy.

I have no doubt in my mind that from the evidence before me, it is clear that the defendant was to blame for the stoppage of the work from the 15th of May 2023 onwards. Clause 20 of the contract had provisions for dispute resolution and clause 21 also provided clear terms for breach and termination of the contract. The defendant acted unlawfully and outside the perimeters of the contract in stopping the plaintiff to work. The plaintiff did not admit the allegation that it had defrauded the defendant and hence it paid for the alleged variance under protest just for the sake of progress in resolving the impasse between the parties. Had the plaintiff fulfilled its part

of the bargain or prayed that it is ready to do such in the relief sought, this court would have been persuaded to invoke the doctrine of fictional fulfilment to allow the plaintiff to collect the remaining timber and also harvest and collect timber from the remaining two clusters against payment of its value. Unfortunately, the agreed facts, the plaintiff's pleaded case, the documents placed before me as well as the relief sought by the plaintiff do not permit a court of law to take such course. The only proper thing for me to do is to do nothing in face of the plaintiff's plight because there is nothing correct that I have been asked to do. A court of law is not only handicapped from making up a contract for the parties, it is also equally handicapped and barred from making up pleadings for the parties by granting a relief not sought by either of the parties. There is nothing proper that a referee in a football match can do to help a losing team.

Moreover, as things stand, I am not persuaded by the plaintiff's submission that the defendant would be unjustly enriched by retaining the timber. I also disagree with the plaintiff that the defendant has expropriated its timber. How can that be the case when the defendant has not invoiced the plaintiff and also when there is no evidence nor allegation that the defendant has been paid for the value of such timber? All such arguments of equity are misplaced in this case. The plaintiff stands to lose nothing if the defendant retains the disputed timber until it gives it away for value.

For the above reasons, I therefore conclude that the plaintiff has failed to prove on a balance of probabilities that it is entitled to the relief sought. It has failed to prove that it is entitled to collect the 1 300m3 pine logs and also to harvest and collect timber from the two clusters remaining or to be paid the value thereof. The plaintiff is not guilty of any conduct warranting an order of costs at a punitive scale as prayed for by the defendant in its plea. I therefore order as follows:

The plaintiff's claim be and is hereby dismissed with costs.

Mugadza, Chinzamba & Partners, plaintiff's legal practitioners
Scanlen & Holderness, defendant's legal practitioners