ESTHER GANDAWA
versus
JOSHUA GOPOZA

HIGH COURT OF ZIMBABWE
MHURI J
HJARARE, 1 June and 31 August 2022

Civil Trial

Mr *D Kufaruwenga*, for the plaintiff
Mr *K C Chinyanganya*, for the defendant

MHURI J: On 25 June 2021 plaintiff issued summons against defendant claiming:

(a) a sum of US$140 000.00 or its Zimbabwe dollar equivalent being cost of replacing an immovable property No. 2657 Aspindale Gated Community, Harare measuring 200 square metres which plaintiff lost to a third party.
(b) a sum of US$6 500.00 or its Zimbabwe dollar equivalent being money expended by plaintiff in legal fees when attempting to enforce the agreement entered into with defendant in case number HC 221/21.
(c) interest at the prescribed rate calculated from date of judgment to date of full payment.
(d) costs of suit on an attorney-client scale.

In summary, as can be gleaned from plaintiff's declaration, plaintiff's case is that on 13 November 2018 plaintiff and defendant entered into an agreement of sale in respect of immovable property described as no. 2657 Aspindale Gated Community, Harare, at the purchase price of US$45 000. This immovable property was in the name of Marimba Industrial Properties Limited. During the time of the negotiations, defendant was also negotiating with one Fanuel Kapanje to whom he sold the same property for a sum of US$140 000.00 and gave vacant possession to. Plaintiff paid defendant the purchase price but lost the immovable property to Fanuel Kapanje through litigation under HC 221/21. As a result of this litigation he also lost US$6 500.00 through legal fees.

Defendant entered appearance to defend, filed his plea and a counter-claim. In summary, in his plea he denied making any misrepresentation to plaintiff but that it was plaintiff who made a misrepresentation to the effect that she would pay the full purchase price

in cash. That plaintiff purchased stand no. 2659 and not 2657. The agreement was at all material times related to stand no. 2659 and she lost the property due to her breach of the agreement. He was not liable for costs plaintiff incurred over an immovable property he did not sell to her.

In his counter-claim, defendant averred that an incorrect description of the immovable property was made, instead of 2659, 2657 was recorded and that it was also incorrectly recorded that the balance of the purchase price be paid by way of bank transfer. He is claiming an order rectifying the above, to wit that the words stand 2659 be substituted for the words stand 2657 and substitution of the words cash payment for the words bank wherever the latter occur.

The issues agreed upon and referred to trial at a pre-trial conference before a Judge were five (5). These are:

1. Whether or not the defendant committed a fraud in regards to the sale of the immovable property in question?
2. Whether the immovable property sold by the defendant and bought by the plaintiff was stand 2659 or stand 2657?
3. Whether or not the plaintiff committed a breach of the agreement of sale between herself and the defendant. If so, in what respect?
4. Whether or not the defendant committed a breach of the agreement of sale between himself and plaintiff. If so in what respect?
5. Whether or not the plaintiff suffered damages by reason of the defendant's breach of contract. If so, the quantum of damages.

The onus to prove issues 1, 4 and 5 was on plaintiff and 2 and 3 was on defendant.

Plaintiff's Case

Plaintiff was the only witness for her case after having dispensed with the second witness she had indicated she was going to call.

Plaintiff's evidence was that she resides at ZRP New Camp, Highfield PC 104. She saw an advert in the social media about a house which was on sale. She contacted the agent Rootpro which was selling the house on behalf of the defendant. She offered US$45 000.00. She viewed the house at Aspindale Park. There were two houses on offer 2657 and 2659 and she chose 2657. This was in the presence of defendant's wife and the agent's representative.

It was her testimony that after viewing and choosing the house, they went to Rootpro where she paid US$25 000.00 in cash to defendant's agent. She was supposed to pay the

balance over eight (8) months through bank transfer. After the payment of US$25 000.00, she signed the agreement of sale and was given the key to house no. 2657 which keys she kept for three (3) months, but was later approached by the agent who stated defendant had said that she surrenders the keys until she finished paying the balance.

Plaintiff further testified that in July defendant complained that she was not paying the instalments and yet she was paying through the agent and within the eight months, she had paid the last instalment. She then discovered that defendant had sold the same house to Fanuel Kapanje. She tried to phone defendant and his wife to no avail. She made a complaint which resulted in litigation which she lost, Fanuel Kapanje was awarded the house by the court.

Her claim was that she wants the same amount US$140 000.00, Fanuel Kapanje bought the house for, this amount would afford her a decent house as she would have bought in 2018. Further she testified that she claims the legal fees she incurred in litigation against defendant and F Kapanje.

To support her case, plaintiff produced the agreement of sale she signed on the 13th of November 2018 as Exhibit 1, Exhibits 2a, 2b, 2c, confirmation of payment of balance through bank transfer of RTGS4 700.00 to Rootpro, exhibit 3 proof of bank transfer, exhibit 4 agreement of sale between defendant and Fanuel Kapanje signed on 16 November 2018, exhibit 5 High Court judgment HH 221-21.

Under cross-examination plaintiff reiterated that she paid US$25 000.00 as initial deposit, the balance was to be paid through bank transfer and that the balance was to be paid in US$ and that she paid it in RTGS on a 1:1 rate as the law then dictated. She complied with the terms of the agreement in full. She maintained that defendant defrauded her because she signed the agreement of sale on the 13th of November 2018 and three (3) days later defendant signed another agreement of sale with F. Kapanje. She denied any collusion between herself and the Rootpro to change the house numbers on the agreement of sale from 2659 to 2657, and stated that the agreement was drafted by defendant and his agent.

Defendant's Case

Defendant was the only witness in his case.

He testified that he had some stands in Aspindale which he developed and put up for sale. He engaged an agent Rootpro Properties Real Estate to do the sale. The stands were advertised in the media for RTGS150 000.00. The agent found a buyer (plaintiff) who offered US$45 000.00 which he accepted. He sold house number 2659 and not 2657 to plaintiff after she had been shown the two houses and she chose 2659.

It was his further testimony that his wife supplied the agent with the leases to the houses for purposes of drafting the agreement of sale. It was then that an error was made by the agent in that they endorsed the numbers wrongly on the agreement of sale. Plaintiff paid a deposit of US$25 000.00 and was given keys to house number 2659. Later Clipcrant Agent came with another buyer for house number 2657. He sold the house for RTGS140 000.00 and not US$140 000.00 which was an error as a 200m stand could not be sold for US$140 000.00..

As regards the balance of US$20 000.00 to be paid by plaintiff, it was his evidence that this was to be paid in two (2) weeks but he observed that eight (8) months had been endorsed in the agreement. It was supposed to be paid in US$ and not RTGS as plaintiff did.

Under cross-examination defendant agreed that:

Root Pro Property Real Estates were his agent.

- He instructed them to sell his property on his behalf.
- That they drafted the agreement of sale after which they phoned him to come and sign it.
- When he got to their offices, he found that the deposit was US$25 000.00 and not US$35 000 as earlier advised.
- The repayment period for the balance was now 8 months instead of two (2) weeks.
- He read the agreement before he signed it.
- The balance of US$20 000.00 was to be paid through bank transfer.
- that by endorsing his initials on every page on the agreement of sale he was agreeing with contents of each page.
- the evidence shows that he sold number 2657 to plaintiff and not 2659.
- exhibit 4 is an agreement of sale between him and Fanuel Kapanje and it related to 2657 and the amount is US $140 000.00
- the evidence shows that he sold the same property to two different people.

On the amount of US$140 000.00 defendant explained that it was an error to state it was US$ instead of RTGS and that he did not have the error corrected because there was no prejudice to him as he got the amount he wanted.

Defendant maintained his position that he did not double-sell the same property 2657. He disputed that he is liable to pay plaintiff the legal fees she incurred in litigation with Fanuel Kapanje. He then closed his case.

The following facts are undisputed, that:

- Defendant was selling some properties in Aspindale. He engaged some estate agents for this purpose, namely Rootpro Properties Real Estate, Rawson Properties and Clipcrunt Real Estate.
- Rootpro sold number 2657 for US$45 000.00 to plaintiff and on 12 and 13 November 2018 defendant and plaintiff signed an agreement of sale.
- Clipcrunt sold the same property 2657 to Fanuel Kapanje for US$140 000.00 and on 16 November 2018, defendant and Fanuel Kapanje signed an agreement of sale.
- Clipcrunt also sold property number 2661 for US$49 000-00 to Tungamirai Chemhere and defendant and Tungamirai signed an agreement of sale on 17 July 2018.
- Rawson Properties sold property 2559 to Talon Garikayi, for US$40 000.00 and on 17 April 2020 defendant and Talon signed an agreement of sale.
- All these 3 properties measured 200 square metres each.
- Property2657 was sold to two different buyers as per the agreements of sale.
- By an Order of this Court under case No. 9584/19, the agreement of sale between defendant and plaintiff was declared valid and enforceable.
- By a judgment No. HH 221/21 under case No. HC 4826/20 plaintiff lost the property 2657 to Fanuel Kapanje.

The following issues are in dispute, that defendant did not sell 2657 but 2659 to plaintiff, the purchase price for the same property was RTGS 140 000.00 and not US$140 000-00 paid by Fanuel Kapanje, there was no fraud committed by defendant and that defendant was not liable for plaintiff's legal fees as claimed.

In determining this matter, I am also guided by the judgment of my sister judge JUSTICE MUZOFA in the matter under HC 4826/20.

ESTHER GANDAHWA
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MARIMBA INDUSTRIAL PROPERTIES LTD
REGISTRAR OF DEEDS
HH 221/21

In refuting the allegation of fraud, defendant denied that he sold the same property to two different people. His evidence was that he sold 2659 to plaintiff and 2657 to Fanuel Kapanje. The evidence placed before me speaks otherwise. Firstly, it was not in dispute that

when plaintiff went to view the houses, she was with the agent and it was in the presence of the defendant's wife. She chose number 2657. Secondly, the agent drafted an agreement of sale in respect of number 2657. Defendant after reading the agreement of sale, signed it as is, without any amendments, he initialed every page hence signifying the correctness of the contents of the document he was signing. The caveat subscriptor rule applies in this case. Defendant is bound by his signature. *Muchabaiwa v Grab Enterprises (Pvt) Ltd* 1996(2) ZLR, 691, stated the general principle that:

> "….a party to the contract is bound by his signature, whether or not he has read or understood the contract, or the contract was signed with blank spaces later to be filled in."

Defendant and applicant signed their agreement of sale on the 12th and 13th November 2018. Defendant did not see it fit to call his wife to give evidence refuting plaintiff's evidence that she chose number 2657 and she gave her keys to number 2657. I therefore do not accept defendants' evidence that he sold plaintiff number 2659.

Hardly after three (3) days, that is on 16 November 2018 the defendant signed an agreement of sale with Fanuel Kapanje in respect of the same number 2657. Defendant signed and initialed each page of the agreement as is. He sold the property for US$140 000.00. At the time he entered into an agreement of sale with F Kapanje, it can be rightly inferred that he knew that he had entered into an earlier agreement of sale in respect of the same property with plaintiff who had by then paid the initial deposit of US$25 000.00.

I do not accept the testimony by defendant that there was connivance between his agent and plaintiff to endorse 2657 on the agreement. This averment was not supported by any evidence. Further, the property was being handled by two different agents and it is defendant who knew this.

After the signing of the agreement of sale and payment of the initial deposit, defendant kept on receiving money from plaintiff and according to his evidence he enquired or made follow ups with the agent as regards the balance which plaintiff had stopped paying and on 1st July 2019, on the strength of the agreement of sale, he wrote to plaintiff advising her of the breach of terms of the agreement and on 18 July 2019 he wrote to plaintiff cancelling the agreement. After receipt of the first letter, plaintiff remedied the breach, paid the balance. All this gave plaintiff false hope that she is the owner of number 2657 and yet by then defendant knew he had sold the property to another person. Defendant misrepresented that the property was available and yet it had been sold to F Kapanje hence the reason why plaintiff lost it to Kapanje. In case no. HC 4826/20, MUZOFA J'S judgment, which is extant. It is stated:

"This is a case of a double sale of immovable property…."

She went further to state:

"The first respondent Joshua for obvious reasons did not file any response."

From the foregoing, I am satisfied that defendant committed a fraud. He was fraudulent in the manner he dealt with stand 2657.

It also goes without saying that in view of the fact defendant did not deliver or transfer the property to plaintiff, he was in breach of the terms of agreement. Plaintiff paid the purchase price US$25 000 upon signing of the agreement. She paid the balance through bank transfer as per the terms of the agreement, though in RTGS as the law, Finance Act No. 2/2019 then applied.

The case of *Zambezi Gas Zimbabwe (Pvt) Ltd* v *Barber (Pvt) Ltd and Anor* SC 3/20 interpreted the position *vis a viz* obligations that were incurred before February 2019. Debts which were incurred in US$ were to be discharged on a rate of 1:1 and this is what plaintiff did. She discharged her side of the bargain. It is not acceptable that she had to pay RTGS150 000.00 which defendant testified was the initial purchase price. No evidence to prove this was adduced. If the defendant felt short changed by the change in law, tough luck he cannot be allowed to revert to the initial purchase price, moreover the order under HC 9584/19 declared the agreement valid and enforceable in all material respects.

Defendant on the other hand has not lived up to his side of the bargain. He has not given transfer to plaintiff. Plaintiff lost the property 2657 to F Kapanje as a result of the double sale. He is unable to give her transfer even of property 2659 which he alleges he sold to plaintiff. Following this, did plaintiff suffer any damages? The answer in my view is in the positive. To that end, what is the quantum?

Plaintiff correctly stated the principle behind the payment of damages for breach of contract. She referred to R H Christie's book "*Business Law in Zimbabwe*" at 127-128:

> "Damages for breach of contract are intended to place the innocent party in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship on the defaulting party. Damages for breach are therefore not calculated in the same way as damages for delict, which are intended to compensate the innocent party for what he has lost rather than what he should have gained."

In casu, plaintiff would like to be put in a position she would have been had defendant fulfilled his side of the bargain. She is claiming US$140 000.00, which she derives from the purchase price F Kapanje paid for the very same property she was deprived of. Defendant

opposed this and labelled it as greed by plaintiff on the basis that the property did not cost that much but was pegged in RTGS and not US$.

I do not believe defendant's averment in this regard. If the price was pegged in RTGS why would the agreement of sale be endorsed with US$? As stated earlier, he signed the agreement of sale which reflected the purchase price as US$140 000.00 which was to be paid upon signing of the agreement of sale. Defendant did not call the agent to support his averment that the price was in RTGS and was paid as such into the agent's trust account.

Further in judgment no. HH 221/21 it is stated that second respondent (Fanuel Kapanje) highlighted that he paid US$140 000.00 as the purchase price which is almost triple the amount paid by applicant (plaintiff). As I indicated earlier, in the judgment it is stated defendant did not file any response and also that the judgment is extant. I find therefore that the property was sold for US$140 00.00.

As alluded to earlier in this judgment, three (3) properties in the same area were sold by defendant. These are:

2657 measuring 200 square metres to plaintiff for US$45 000.00 in November 2018 (also sold to Kapanje for US$140 000.00).

2661 measuring 200 square metres to Chemhere for US$49 000.00 in July 2018.

2559 measuring 200 square metres for US$40 000-00 to Garikayi on 17 April 2020.

Taking into consideration that these properties all measured 200 square metres and had shell houses and plaintiff's Garikayi's and Chemhere's purchase prices were in the range of between US$40 000.00 and US$49 000.00 I consider that damages around that range would adequately put plaintiff in a position she would have been had defendant not breached the agreement. An amount of US$65 000.00 will be adequate damages for plaintiff.

On the legal fees claim, defendant's position was that plaintiff chose to go the legal route hence she should bear the fees herself and not him. It is to be noted that plaintiff took the legal route as a result of defendant's conduct. If defendant had not double sold the property, plaintiff would not have instituted the proceedings she did in a bid to assert her rights. I find therefore that defendant is liable to reimburse plaintiff the legal fees in the amount of US$6 500.00 she expended.

DISPOSITION

I found that:

- Defendant committed fraud in regard to the sale of the immovable property 2657
- The property sold to plaintiff was 2657 and not 2659

- Plaintiff did not breach the agreement of sale in any manner.
- Defendant breached the agreement of sale between plaintiff and himself.
- Plaintiff suffered damages as a result of defendant's breach

It is my considered view that this matter could have been settled amicably without need to refer it to trial. As the PTC judge remarked that defendant's intransigence on possible settlement issues has led to the matter being referred to trial. This has a bearing on the scale of costs.

In the result, plaintiff succeeds in her claim.

IT IS ORDERED THAT:

1. Defendant pays plaintiff a sum of US$65 000.00 (Sixty five thousand) or its lawful Zimbabwe dollar equivalent at the date of payment being the reasonable cost of replacing an immovable property commonly described as 2657, Aspindale Gated Community Harare measuring 200 square metres in extent
2. Defendant pays plaintiff a sum of US$6 500.00 (Six thousand five hundred) or its lawful Zimbabwe dollar equivalent at the date of payment being the amount expended by plaintiff as legal fees in case no. HC 4826/20.
3. Interest thereon at the prescribed rate calculated from date of full payment.
4. Defendant to bear costs of suit on the legal practitioner and client scale.

Dzimba Jaravaza & Associates, plaintiff's legal practitioners
Nyawo Ruzive Attorneys, defendant's legal practitioners