KENNETH CHIKOWORE

versus

E. CHIDAVAENZI

and

CHAMPION CONSTRUCTORS (PVT) LTD

HIGH COURT OF ZIMBABWE

MATHONSI J

HARARE, 7 November 2012, 8 November 2012 and 21 November 2012

*M. Mavhiringidze*, for the plaintiff

*Ms N. Munangati*, for the 1st and 2nd defendants

**Civil Trial**

MATHONSI J: The plaintiff issued summons against the first and second defendants seeking an order for specific performance for the completion of construction of a house by the defendants in terms of an agreement concluded between the plaintiff and the second defendant about November 2006. In that agreement, the second defendant had undertaken to construct on stand 3181 of subdivision A of 159 Prospect, a 4 bedroomed house, all bedrooms with built-in cupboards, the main bedroom with en-suite, separate lounge and dining room, second bathroom with tub and toilet, fitted kitchen with walk in pantry, single lock up garage with a storeroom, a veranda walled on all sides and a manual sliding gate, in consideration of a purchase price of $45 000 000-00 Zimbabwe currency plus 15% value added tax.

In the event of the defendants’ failure to complete the construction, the plaintiff sought an order that a quantity surveyor be appointed to value the cost of the outstanding work and such cost be borne by the defendants. He also sought attorney and client costs.

The plaintiff averred in his declaration that the first defendant is the owner and director of the second defendant which is a duly incorporated construction company. He went on to state that he had entered into an agreement with the second defendant, with the first defendant acting as “representative and agent of the second defendant.” In terms of that agreement, the second defendant had sold stand 3181 of subdivision A of 159 Prospect, to the plaintiff and undertook to erect a house aforesaid which was to be completed within 6 months from 1 November 2006.

Despite the fact that the purchase price was paid in full, the defendants had failed to complete the construction and as such the plaintiff sought an order for specific performance.

The defendants contested the suit and averred in their plea that the purchase price attracted interest of 120% per annum and was to escalate in accordance with increases in prices of building material. As the plaintiff had failed to pay the full purchase price, the first defendant had stopped construction at wall plate level. They prayed for the dismissal of the plaintiff’s claim with punitive costs but not before taking issue with the citation of the first defendant when no cause of action had been shown against her in the summons.

At the pre-trial conference held before a Judge the plaintiff sought and obtained an amendment of his declaration by the deletion of paragraph 9 thereof and the substitution of a new paragraph 9 and a new prayer. The plaintiff’s amended declaration now reads as follows:-

“1. Plaintiff is Kenneth Chikowore, a male adult whose address for purposes

of this suit is care of his legal practitioners of record namely, *Messrs Madanhi*, *Mugadza & Company Attorneys*, 113 Samora Machel Avenue, Harare.

2. First defendant is Elizabeth Chidavaenzi, a female adult whose full and

further particulars are to the plaintiff unknown but her address is 7th Floor,

East Wing, Robinson House Corner Kwame Nkurumah Avenue Angwa

Street, Harare. The first defendant is owner and director of the second

Defendant.

3. Second defendant is *Champion Contractors (Pvt) Ltd Company*

incorporated in terms of the laws of Zimbabwe and its address of (sic) service

is the same as that of the first defendant.

4. On or about the 15th December 2006, the plaintiff entered into an agreement

with the second defendant. The first defendant was the representative and agent

of the second defendant. A copy of the agreement is attached hereto marked

“A”.

5. In terms of the agreement, the second defendant sold a piece of land to the

plaintiff namely stand number 3181 of subdivision A of 159 Prospect,

measuring 894 square metres. In terms of the aforesaid agreement, the

defendants were to erect a ‘4 bedroomed house’ as fully described on paragraph

1 of the agreement of sale.

6. The purchase price of the property and the subsequent developments was

agreed to be $45 000 000-00 (forty five million dollars) plus a VAT of 15%.

The plaintiff has paid in full within the stipulated period of six months without

any arrears.

7. In terms of the agreement of sale, the construction of the house was supposed

to be completed within 6 months from the first of November 2006 i.e it should

have been completed by the end of April 2007.

8. The defendants have only developed the property up to the foundation level by

the 26th of June 2007. The plaintiff have (sic) on divers occasions demanded

that the defendants comply with the agreement but the defendants have turned a

deaf ear to the plaintiff’s numerous demands.

9. It is just and equitable that the defendants be ordered to sign papers effecting

transfer of a piece of land called stand number 3181 of subdivision A of 159

Prospect, measuring 894 square metres failure of which the Deputy Sheriff is

hereby ordered to sign the same on their behalf.

WHEREFORE,the plaintiff claims against the defendants;-

1. Transfer of a piece of land namely stand number 3181 of subdivision A of 159 Prospect measuring 894 square metres within 10 days of the order.
2. Costs of suit on a legal practitioner and client scale.”

It is not clear where paragraph 9 of the declaration comes from and indeed how paragraph (a) of the prayer can sit with the rest of the declaration which outlines a case for specific performance and not for transfer. Indeed, the prayer for transfer of the property has not been pleaded at all. To make matters worse, the face of the plaintiff’s summons has not been amended. In the summons the plaintiff still claims specific performance and the appointment of a quantity surveyor to value the cost of completing construction of the house for the account of the defendants. The plaintiff’s summons and declaration as amended, are clearly defective. At the pretrial conference of the matter the parties identified the issues for trial as:

“PRELIMINARY ISSUE

1. Whether or not the plaintiff has established a cause of action for its (sic) claim.

ISSUES

1. Whether or not the plaintiff paid the full purchase price in terms of the

agreement.

1. Whether or not on their part, the defendants have discharged their obligation in terms of the agreement.
2. Whether or not the plaintiff is entitled to the transfer of the property”.

I must say that before the trial commenced, Mr Muhlolo of *Chinongwenya and Zhangazha* renounced agency on behalf of the defendants and Ms Munangati *of Munangati & Associates* took over. She immediately took a preliminary point that the first defendant had been wrongly cited given that she is not a party to the agreement between the plaintiff and the second defendant.

Mr Mavhiringidze for the plaintiff responded that the second defendant is “a brief case company” to such an extent that an order granted against it without including its director would be useless. The court must pierce the corporate veil in order to reveal who is behind the company. Unfortunately for the plaintiff all that was submitted by his counsel on that point was not pleaded at all. No case was made in the pleadings for one to even begin considering lifting the veil of incorporation. The first defendant was cited in these proceedings as a “female adult whose full and further particulars are unknown.” It is also averred in paragraph 2 of the plaintiff’s declaration that “ the first defendant was the representative and agent of the second defendant” which is incorporated in terms of the laws of Zimbabwe.

It is a celebrated principle of our company law that a registered company is a separate legal *persona* which is distinct from its members or directors. The court will only deviate from that principle where it considers that incorporation is being used for fraudulent purposes or other improper conduct in the use of the company: *Van Niekerk v Van Niekerk & Others* 1999 (1) ZLR 412 (S) at 427 G-H and 428 A, *The Shipping Corporation of India Ltd v Evdomon Corporation* *and Another* 1994 (1) SA 550 (A) at 566C-E; *Barnsley v Harambe Holdings ( Pvt) Ltd* *and Another* HH84/2012 at p5; *Mangwendeza v Mangwendeza* 2007 (1) ZLR 216 (H) 217F.

To the extent that the plaintiff alleges that the agreement was between the plaintiff and the second defendant, a separate legal persona, the liability or otherwise of the first defendant has not been set out in the pleadings and no cause of action has been established against her.

The plaintiff’s case must stand or fall on his pleadings. As the pleadings stand, no cause of action exists against the first defendant. It is remarkable that the plaintiff was alerted to this anomally in the defendants’ original plea where in paragraph 10 it is averred;-

“No cause of action has been pleaded by the plaintiff against the first defendant.”

Notwithstanding that averment, the plaintiff did not see the wisdom of amending his declaration to show a cause of action against the first defendant. It was for the foregoing reason that I upheld the preliminary point taken on behalf of the first defendant.

The plaintiff’s case was opened with the evidence of Patience Chikowore who represented the plaintiff by virtue of a power of attorney issued by the plaintiff in her favour. She is the plaintiff’s sister and is the one who signed the agreement of sale on behalf of the plaintiff. She stated that she paid the purchase price to the second defendant in terms of the agreement of sale signed by the parties. Although the parties had signed the first agreement of sale it was later replaced by the one signed on 18 and 21 November 2006 which the plaintiff is relying upon in his claim. The new agreement was necessitated by the need to increase the purchase price as required by the second defendant.

Patience Chikowore went on to say that although the plaintiff paid the full purchase price within the 6 months period provided for in the agreement, the second defendant failed to construct the house. When they went to inspect the house at the end of 6 months they discovered that construction work had stalled at ground level. She had been shown the building material which had been acquired for the construction and the first defendant had advised her that the biggest problem was that she could not afford to purchase material for roofing and suggested they source that material. They did not do so after the defendants rejected their suppliers.

When there was still no development 5 months later, she again confronted the defendants only to be advised that they had sold the building material meant for the construction of the plaintiff’s house to raise money to pay workers’ salaries. There was still no progress at the site prompting her to enlist the services of lawyers to enforce the agreement. The plaintiff’s lawyers wrote to the second defendant demanding compliance with the agreement forcing the second defendant to construct the house up to window level. 4 years later no further construction had been done as a result of which this action was instituted.

Chikowore testified that having realised that the second defendant no longer has the capacity to finish the construction of the house the plaintiff now seeks an order directing the second defendant to transfer the house to him so that he can complete construction, he having already taken occupation. She stated that at no time was the plaintiff notified by the second defendant of any escalation in the construction costs and denied that the plaintiff owes the second defendant a sum of US$55 200-00 as alleged by the second defendant.

In light of the fact that the plaintiff discharged his obligation in terms of the agreement he is entitled to an order for transfer of the property.

Under cross examination it was drawn to the witness’ attention that the plaintiff had not paid the full purchase price and had not paid value added tax in terms of the agreement. She denied this insisting that the plaintiff had in fact overpaid, that no interest was due as all the instalments were paid timeously. Asked why the plaintiff had not given the second defendant written notice in terms of clause 12 of the agreement, she stated that they wanted an amicable settlement of the dispute. She however maintained that the court should rely on the agreement of sale signed in November 2006.

Kudzanai Gara also testified on behalf of the plaintiff. He is the husband of Patience Chikowore who was assisting her in her dealings with the second defendant. He corroborated the evidence of his wife Chikowore including that after the agreement was signed they were taken to the site and shown the building material the second defendant had acquired for the construction of the house. It is this building material which second defendant later sold to pay its workers’ salaries. Gara added that after the second defendant had failed to perform in terms of the agreement, he had accompanied the plaintiff to see the second defendant about the issue. The first defendant had then undertaken on behalf of the second defendant to complete construction within 2 weeks. The plaintiff then elected not to proceed in terms of clause 12 of the agreement as he prioritised having the house constructed especially as they had paid all the instalments due.

Gara stated that the construction work is mainly at wall plate with one side at window level but no slab was put up. Only brick work was done. As he is also in the building industry, he estimated the cost of constructing the house in question at between US$35 000 and US$45 000 and said one would need a further US$15 000.00 to complete what has been started.

At the close of the plaintiff’s case, Ms Munangati for the defendants made an application for absolution from the instance arguing that the plaintiff has failed to establish a *prima facie* case for the relief sought. The claim for transfer of the property as it stands is not provided for in the agreement of the parties and has not even been pleaded.

Mr Mavhiringidze for the plaintiff countered that arguing that a prima facie case has been established in that the plaintiff has shown that the purchase price was paid in terms of the agreement but that agreement cannot be complied with religiously. He took the view that it was within the contemplation of the parties that the agreement could be performed through what he termed “an equivalent act” presumably in reference to transfer of the property in its present form. The agreement of sale on its own does not show the intention of the parties.

In considering an application for absolution at the close of the plaintiff’s case, what the court has to address was started by the learned authors, Herbstein and Van Winsen, *The Civil Practice of the Superior Courts in South Africa*, *Juta & Co Ltd*, 3rd Addition, at p 462 as ;

“The lines along which the court should address itself to the question of whether it will at that stage grant a judgment of absolution have been laid down in the leading case of *Gascoyne* v *Paul & Hunter* 1917 TPD 170, which contains the following formulation:

‘At the close of the case for the plaintiff therefore the question which arises for consideration of the court is: Is there evidence upon which a reasonable man might find for the plaintiff?..... The question therefore is, at the close of the case for the plaintiff, was there such evidence before the court upon which a reasonable man might but not should give judgment, against Hunter?’

It follows from this that the court is enjoined to bring to bear on the question the judgment of a reasonable man and ‘is bound to speculate on the conclusion at which the reasonable man of (the court’s) conception not should, but might or could arrive. This is the process of reasoning which, however difficult its exercise, the law enjoins upon the judicial officer.”

See also *Gavaza* v *Shumba & Anor* HH 268/12; *Ebrahim* v *Pittman N.O* 1995 (1) ZLR 176 187 C-G.

In the present case, the plaintiff is seeking to enforce an agreement of sale signed between the parties. Although Chikowore testified that there was an earlier agreement which the first defendant tore away when she wanted to increase the purchase price, she insisted that the plaintiff is relying on the agreement signed in November 2006. She really had no choice in that regard because the plaintiff’s claim has been predicated upon that agreement in the pleadings.

In terms of clause 2 (viii) of the agreement;

“Transfer of the sold property shall be effected subject to full payment of the purchase price of the house and stand by the purchaser, completion of the house construction and acquisition of the capital gains clearance certificate by the seller.” (The underlining his mine)

There is a dispute as to whether the full purchase price was paid which can be resolved by evidence of both parties. What stands out though is the fact that construction of the house has not been completed and therefore one of the conditions for transfer has not been met. The plaintiff cannot be said to be seeking to enforce the agreement by demanding transfer when a condition precedent has not been met.

Clause 3 (iii) also imposes another crucial condition. It reads:

“The Purchaser shall not be entitled to occupy the stand nor put any improvements thereon until all the required ground services are put in place, and building of the house, durawall and sliding gate are all completed.”

It is common cause that these conditions have not been met. There is also clause 12 of the agreement which accords the plaintiff certain remedies in the event of the second defendant’s breach. It provides.

“Should the seller fail to effect services on the stand or fail to build the house, then the purchaser shall in writing call upon the seller to rectify such failure within thirty (30) days and thereafter the purchaser shall have the right to give a sixty (60) days written notice of cancellation of the agreement, and claim whatever amount paid to the seller with a thirty percent (30%) per annum interest as the agreed prescribed rate thereon.”

The plaintiff elected not to proceed in terms of this clause but to seek transfer of the property as it stands. Such remedy is clearly not provided for in the agreement of sale which the plaintiff purports to enforce. The plaintiff has taken that course of action because he is of the view that the second defendant no longer has the where-withal to construct the house. He would rather build the house himself.

This may be a very noble idea indeed given the circumstances which show that the second defendant may have long run into difficult times.

However the difficulty is that the plaintiff’s pleadings are at variance not only with the prayer for transfer, he not having pleaded at all the basis for seeking an order for transfer, but also with the evidence that has been led on behalf of the plaintiff. I have cited the plaintiff’s entire declaration above and clearly no case has been made for transfer.

Stung by that, Mr Mavhiringidze sought to argue that the court should order transfer on the basis “of justice and equity.” He submitted that the court must be prepared to do justice between the parties. The plaintiff may have a good case for seeking transfer but that case does not appear in the pleadings. It is trite that the plaintiff’s case and indeed the defendant’s case, stands or falls on the pleadings.

Therefore, on the pleadings as they stand and the evidence that has been led on behalf of the plaintiff, no reasonable man might give judgment in favour of the plaintiff. I must say that the plaintiff’s problems stem from his counsel’s inability to grasp the basics of pleading as ultimately it is the legal practitioner who is entrusted with the presentation of the case through the pleadings. While one may sympathise with the plaintiff, he must live with his choice of legal practitioner.

I therefore conclude that this is a case which justifies giving an order of absolution. As the second defendant has been absolved from the instance, the second defendant is the successful party and the costs should follow that result.

In the result it is ordered that:

1. The plaintiff’s claim against the first defendant is hereby dismissed with costs.
2. The second defendant is hereby absolved from the instance.
3. The plaintiff shall bear the second defendant’s costs on an ordinary scale.

*Madanhi, Mugadza & Company Attorneys*, plaintiff’s legal practitioners

*Munangati & Associates*, defendants’ legal practitioners