CONSCIOUS MATIVENGA
versus
ZIVANAI SITHOLE
and
REGISTRAR

HIGH COURT OF ZIMBABWE
KATIYO J
HARARE, 20 April 2023 and 4 July 2024

Opposed Matter

Mr T.H Gunje, for the plaintiff
Mr E Dondo, for the defendant

KATIYO J:

Action

The plaintiff issued summons out of this court claiming the following order

1. An order directing first defendant to accept delivery of 600 bags of pc 15 cement at an address of choice in Harare or Ruwa

In the alternative

An order directing Plaintiff to pay into the sheriff of Zimbabwe's account, the sum of $7780.00, for and on account of the first defendant if the first defendant fails to provide plaintiff with an address within Harare or Ruwa for the delivery of the 600 bags of PC 15 cement within ten (10) days of this order. An order compelling first defendant to take all necessary steps to pass transfer of 22426 Riverside Park, Ruwa to plaintiff within ten (10) days of delivery of the 600 bags of PC 15 cement or payment of $7 780.00 by plaintiff in terms of paragraph l above.

In the event of first defendant failing to comply with the terms of paragraph above, the Sheriff of Zimbabwe, or his lawful deputy, be and is hereby authorized to sign all

such papers including Powers of Attorney to Pass Transfer, Declarations in terms of the Deeds Registries Act [*Chapter 20:05*] and applicable Regulations and do all such things necessary to effect the transfer of the property to the said plaintiff.

First defendant shall pay the costs of suit.

Brief Background

Sometime around in October 2013, plaintiff and first defendant entered into an agreement for the sale and purchase of a certain immovable property described as; Certain piece of land situate in the District of Goromonzi Called Stand 22426 Ruwa Township of Subdivision A of Subdivision C of Sebastopol Measuring 2040 square meters (commonly known as 22426 Riverside Park, Ruwa) The agreement was subsequently reduced to writing and signed by the plaintiff and is defendant on 16th October 2013. A copy of the agreement is attached hereto as *Annexure "A"*.

In terms of the agreement between plaintiff and first defendant;

The purchase price was $25 000.00

In addition to the property, parties also agreed that some 13 500 cement bricks be sold together with the immovable property for a price of $500. $25 500.00 For both, the immovable property and the bricks. The purchase price was to be paid by the plaintiff as follows; by delivering a truck load (600 bags) of PC15 cement on 9* October 2013 at 9852 Hopley Township, Harare by paying cash amounting to $9 940.00. The value of each truck load of cement was agreed to be $7 780.00. Transfer of the property through the second defendant was to pass from first defendant to plaintiff upon payment of the purchase price in full. Pursuant to the agreement, and in partial fulfillment of his obligations; plaintiff delivered the first truck load of cement on 9 October 2013 valued at $7 780.00 to is defendant.

Plaintiff paid the sum of $6 000.00 in cash at 22426 Riverside Pork, Ruwa to (plaintiff.) Plaintiff paid the sum of $4 000,00 in cash on at Jarzin-Market Square to (plaintiff,) Plaintiff paid the sum of $2 400.00 in cash at Letombo-sasa to Plaintita.

Plaintiff tendered delivery of the outstanding 600 bags of cement, or the monetary equivalent of $7 780.00 to first defendant. Despite demand, first defendant has refused

to accept delivery of 600 bags of PC cement or the monetary value thereof and has refused to pass transfer of the property to the plaintiff.

Issues for determination

1. Whether or not the plaintiff breached material terms of the agreement
2. Whether or not there was repudiation of the agreement and if so the effect of that.
3. Also, whether or not the relief of specific performance is available where the agreement is adjudged or deemed repudiated
4. How much was paid by the plaintiff and balance thereof

These were the issues for determination.

Let me at this juncture point out that the parties agreed that the matter will proceed as stated case as opposed to a trial.

In his plea the defendant denied that the plaintiff had paid the money in installments of $6000,4000 and $2400 and tendered a delivery of 600 bags of cement or alternative cash of $7780 to first defendant but that he only made one payment of $8920 as a single transaction at Riverside in Ruwa and had paid one truck of load of cement in early October 2013 before the agreement was signed. From there he was nowhere to be seen and only to appear through a letter of demand done by his lawyers. The defendant insists that from the day the agreement was signed on 16 October 2013, the plaintiff was nowhere to be seen. He only resurfaced in 2016.He then alleges that, that was a clear sign of non-committal leading him to repudiate and cancel the contract. In view of that one can then not seek specific performance? The first defendant went on to construct a four roomed cottage.

The Agreed Facts

1. That there was verbal agreement between the parties on the 8th of October 2013 over the sale of property known as stand number 22426 River Side Ruwa
2. The agreement was reduced into writing on the 16 of October 2013
3. That the purchase price was USD25000 and the terms thereof are as per agreement dated 16 October 2013.

4. The first truckload of cement valued at USD 7780 was on 9th October 2013.
5. Parties agree that due date for payment was on 8 November 2013
6. The plaintiff alleges that he paid a total of USD $20180 while the defendant alleges that he received USD $16700.

When the appeared, it was agreed that they would file their closing submissions by close of business on or before the 16 of October 2023.As I write this judgement only have closing submissions from the first defendant. There is no explanation as to why the plaintiff's closing submissions are not filed.

Defendant closing submissions as put before the court

COMMON CAUSE FACTS AS PER THE STATEMENT OF AGREED FACTS

Background of this matter is largely common cause in that, on the 8th of October 2013, the parties hereto entered into an oral agreement of sale of immovable property commonly known as stand number 22426 Riverside Park, Ruwa. The agreement was subsequently reduced into writing on the 16th of October 2013. The agreed purchase price for the property was USD 25 000.00 payable on or before 8 November 2013, failure which a further extension of 60 days was given to the buyer (plaintiff) to make such payment. In the statement of agreed facts, the 60-day extension period was mathematically calculated and agreed to lapse on 8 January 2014.

From paragraph 5 of the Statement of agreed facts, it is accepted that plaintiff did not pay the purchase price in full on the agreed dates. Suffice to note, this is an accepted and uncontested admission of breach. Further, paragraph 2 of the Round Table Minutes confirms the same position that plaintiff did not pay the purchase price as agreed though he maintains that such delay was marginal. This court must take judicial notice that, interestingly, plaintiff makes the same admission of breach in paragraph 7.3 of an opposing affidavit filed in case HC 5057/21 where he said,

> "Considering the slight delay, I made in paying after I had delivered a truckload of cement on 9 October 2013, I also paid USD 6400. USD 400 and USD 24 000" As a matter of agreed fact, plaintiff's breach of the agreement is not an issue. All parties agree that plaintiff did not perform his obligations. It is accepted that 8 November 2013 and 8 January 2014 passed by with no payment. It is accepted that in the entire 2014, 2015 and half of 2016, plaintiff did not do anything until he issued summons. The inquiry on whether or

not there was a breach is a matter that has been settled by agreed facts."

ISSUES FOR DETERMINATION AS PER THE STATEMENT OF AGREED FACTS

The statement of agreed facts, both parties came up with issues they believe are key in the disposal of this matter, these are they:

a. Whether or not plaintiff breached material terms of the agreement. Whether or not there was repudiation of the agreement. If so, what is the effect of such repudiation?
b. How much was paid by the plaintiff and the balance thereof

The first question is factual in nature and is therefore disposable on proved facts. The second question is legal in nature and it requires an application of the law. The last question is factual and just like the first question, it is disposable on proved facts.

If the first issue is determined against the plaintiff, that will be the end of the case. Again, if the second issue is determined against the plaintiff that will be the end of the case. Put simply, issue 1 and 2 are capable of disposing off the matter individually, if determined against the plaintiff. Herein below, the issues will be considered individually.

a. Whether or not plaintiff breached material terms of the agreement?

The court does not need to go far in order to come up with an answer for this question. This question has been settled by the statement of agreed facts. Reference is made to paragraph 5 of the Statement of agreed facts and also to paragraph 2 of the Round Table Minutes. There is an express admission that plaintiff breached the agreement by failing to pay the full purchase price on the agreed dates. At law, one does not need to prove admitted facts. CHIGUMBA J aptly put it this way in the case of *DELTA CORPORATION* v *S FORWARD WHOLESALERS PRIVATE LIMITED AND ANOR*, HH 53/17, "the common law position has always been clear that judicial admissions are facts which have been formally admitted in pleadings. It is unnecessary for the other party to adduce evidence to prove the admitted facts. It is incompetent for the party who made the admission to adduce evidence to contradict it" Common cause facts established in the pleadings, in particular, the statement of agreed facts and round table

minutes [para 5 and 2 respectively] leaves not even a single grain of doubt that the plaintiff admits breaching the agreement. There is nothing else that can establish breach that an admission contained in statement of agreed facts. If the plaintiff himself admits to the breach, the court cannot do anything except to accept. The court cannot rule or hold otherwise where the plaintiff expressly admits to the breach. For these reasons, the first question of inquiry it being factual is laid to rest by the admitted facts as contained in the documents placed before the court.

Once it is accepted that plaintiff breached terms of the agreement, then that should be the end of the case. The court will note that plaintiff is seeking specific performance. At law, the remedy or relief of specific performance is not available to a plaintiff who himself breached material terms of the agreement. Once the court deals with the question of breach by the plaintiff, there won't be any need to go on with the inquiry. This question alone is capable of disposing the matter. The writer can do no better than to refer this court to the case of *PRAMADVARA APPALRAJU & ANOR* VS *PATJANZA* HH 145/18 where DUBE J as she then was had this to say," The remedy of specific performance is only available to a party who has complied with his part of the contract. A party who intends to rely on the remedy of specific must show that he has performed his part of the contract. He may not seek to rely on the remedy of specific performance where he has failed to perform his part of the bargain." In the above matter, the court cited with approval, Wessels, *The Law of Contract in South Africa* volume 11, where the learned author states that,

> "The court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance on his part. A party is not entitled to a specific performance where he has failed to show that he has performed in terms of the contract" The law authoritatively deals with the plaintiff's situation. It is accepted that he did not perform his part. It is accepted that he was in breach. He never paid the total sum due on 8 November 2013 or within the extension of 60 days, that is 8 January 2014. Instead, he went silent in 2014, 2015 and only resurfaced in mid- 2016 with a claim for specific performance. He thereafter comes to court to claim specific performance. That claim of specific performance is untenable at law. The law clearly and loudly decree that such relief is not available to à plaintiff who is in breach, a plaintiff whose breach has been admitted and is not contested. The plaintiff's claim is at the odds with the law"

The fact that plaintiff breached the contract and that he did not perform his obligations is matter that is common cause and is on record. The court does not need to look elsewhere around when it comes to determining the question of breach. The court simply need to look to the Statement of agreed facts and the round table minutes. There, the court will find express admission of breach.

If this is the accepted factual position, then going by the above cited authorities, plaintiff is not entitled to the relief of specific performance. The law is very clear on the position of a plaintiff who fails to perform his role and yet seeks specific performance. Such relief is not available. Consequently, the relief for specific performance which Plaintiff seeks is not available. That must be the end of the inquiry.

b. <u>Whether or not there was repudiation of agreement? If so, what is the effect of repudiation?</u>

Repudiation of contract by the plaintiff can clearly be discerned from facts of this matter. Payment of full purchase price was due on 8 November 2013. There was a further 60 days extension within which to make payment in the event that Plaintiff had failed to pay by 8 November 2013. On both dates, it is common cause and admitted fact as per the Statement of agreed facts that no payment was made.

From 2013 October 29, plaintiff was nowhere to be found. He was in obscurity in the entire 2014, 2015 and half of 2016. He only surfaced in May 2016 with a demand for specific performance. In paragraph 2 of the round table minutes filed of record, plaintiff admits the breach though the justification is that "the delay in payment of the balance was very marginal". 2 and half years cannot be marginal by any standard.

This court is enjoined to refer to its own records. See *AL SHAMS GLOBAL BVI LTD* VS *DEPOSIT PROTECTION CORPORATION & ORS* ASC 52/22. In HC 5057 /21, which was an application for rescission of Judgment between the same parties, the plaintiff who was the respondent in that matter filed an affidavit dated 18 October 2021 in which he made an admission to the effect that he breached the agreement by not paying. At paragraph 7.3 of the said affidavit, he had this to say, "Considering the slight delay I made in paying after I had delivered a truckload of cement on 9 October 2013,

1 also paid USD 6400. USD 400 and USD 24 000."

This is yet another express admission by the plaintiff to the effect that he breached the agreement. He however tries to justify the breach by saying the delay was marginal [para 2 of Round Table Minutes] and very slight [para 7.3 of the affidavit in HC 5057/21]. This is in addition to paragraph 5 of statement of agreed facts where the admission remains unqualified. What the plaintiff calls "slight delay" or "marginal delay" in the above cited paragraphs is not by any standard slight or marginal. 2 and half years cannot be slight. 19. In so far as plaintiff's conduct is concerned, it is distinetly clear that he repudiated the agreement. One does not need to be a rocket scientist in order to observe this. It is very clear. Circumstances of this case makes it hard for a court that is acting carefully to fail to see that plaintiff repudiated the agreement. As the sun rises from the east and sets in the west, so is the obviousness of the plaintiff's repudiation.

Facts pointing to repudiation are clear like the savannah sunlight. We have a plaintiff who enters into an agreement of sale and commits to pay full purchase price on or before 8 November 2013. He did not do that. He went silent in the entire 2014. Again, the whole of 2015 passed by with no sing from the plaintiff. It was only in May 2016 when plaintiff resurfaced, this time through his counsel demanding specific performance. Such conduct cannot fail the test of repudiation... Because it has been established that plaintiff repudiated the agreement, an argument is being made to the effect that he cannot enforce a contract that he repudiated. There is simply nothing to enforce under such circumstances. You cannot enforce that which is not there. The case of *MWAYERA* VS *CHIVHIZHE & ORS* SC 16/16 is instructive. The position of the law is that a cancelled or repudiated contract cannot be enforced. The relief of specific performance is not available to an agreement that was repudiated. It is in this regard that the claim is clearly frivolous. One cannot dare to attempt to enforce a non-existing agreement.

In the case of *ECONET WIRELESS IN TRUSTCO MOBILE LTD & ANOR* SC 43/13 per MALABA DCJ as he then was, it was held that,

> "It is correct that in determining whether a party has repudiated a contract, the test to be applied is whether the party has acted in such a way as to lead a reasonable person to the conclusion that he did not intend to fulfil his part of the contact. Repudiation may manifest itself in a variety of ways" 23. In case of *THOMAS MEILDES SKRES* VS *MWAITA & ANOR*, SC 21/07 while citing D.J Jorbert's Geurd Principles of the Law of contract, the Supreme court held that,
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> But analyzed to reveal its essentials, a repudiation is nothing more than an intentional communication by the debtor of the statement that he is not going to perform, the paramount right flowing from the repudiation is the right to accept the repudiation and to cancel the contract. Upon cancellation, the respective duties of the parties to perform come to an end. By his conduct, it is beyond reasonable doubt that plaintiff repudiated the agreement and had no intention to be bound by it. There is no mistake about that. At law, repudiatory breach is when one party declares an unequivocal intention not to perform the contact. A declaration of non-performance can either be express refusal or it can be inferred from the conduct. In the present case, Respondent's conduct tells it all. See *IISHA MINING (PVT) LTD* VS *YAKATA TRADING T/A VIKING HADWARE DISTRIBUTES* HB 09/20. See also *NASH* VS *GOLDEN DUMBS (PTY) LTD* (3) SA (A) 1."

Put simply, when one party to a contract indicates to the other expressly or by conduct of its intention to renege, the innocent party is entitled to treat himself as discharged from further performance. The contract is deemed repudiated in that case. Interpreted correctly, plaintiff cannot therefore force fulfillment of the same agreement which he repudiated. The agreement was cancelled and it stands canceled. As such, no party is obliged to fulfil terms of a cancelled agreement.

This Court is invited to examine the various aspects of repudiation. In particular, what constitutes repudiation? The court must also examine whether the plaintiff cannot be adjudged to have repudiated the agreement? Case law provided elsewhere above clearly defines repudiation and ways in which same can occur. The court's duty therefore narrows down to see if plaintiff conduct falls within the bracket of repudiation. Defendant argues that there is no way plaintiff can escape to be adjudged to have repudiated the agreement. Circumstances of the case tells it all. One does not need to be a rocket scientist in order to see this. How much was paid by the plaintiff and the balance thereof? 27. Determination of this question only becomes necessary if all the first 2 issues are determined in favour of the plaintiff. However, if any one or both of the above 2 issues is determined against the plaintiff, that will be the end of the matter.

3. In this case, plaintiff alleges that he paid $20 180 as at 29 October 2013. This is clearly a lie. He who alleges must prove. There is nothing to show that such amount of money was paid. There are only 3 receipts showing payments of USD6000, USD7780 and USD 2400. That's all. Mathematically, plaintiff's figures do not add up. The other payment made into the sheriff's account in 2019 does not count given that it was a result of a default judgment which judgment was rescinded thereof. In any event, that was some 7 or so years after the repudiation. Defendant did not accept it. It was in any event made pursuant to court order that was rescinded. the premises, the plaintiff has no determination are case at all. The first 2 issues for decidedly against the plaintiff. There are unqualified admissions by the plaintiff that indeed he breached terms of the agreement. As in, at law, a plaintiff who breaches an agreement cannot seek a specific performance where he himself is in mora. This is where plaintiff's case should secondly, plaintiff cannot run away from the fact that he repudiated the agreement if we are to go by his conduct. A repudiated agreement cannot be enforced.

In conclusion, key to the determination of this matter are the principles of repudiation. If any those issues are determined against plaintiff, then relief of specific performance is not available to him. In determining this this court must be guided by the statement of agreed facts, in particular where there is an unqualified admission that plaintiff breached the agreement. Secondly, the court must be guided by para 2 of the round tables where there is yet another express admission that there was breach by plaintiff. Lastly, the court will be guided by para 7.3 in HC5057/21 where if yet again expressly admits that he breached the agreement by failing to make payments. All these admissions are not qualified and are express. They are too visible and too loud for the court to ignore. It is exactly these admissions determine the fate of this case. Obviously, the court cannot ignore the ones made by plaintiff neither can it conclude that there was no breach when the plaintiff himself admits it.

Given the closing submissions above as given by the defendant it is clear there was no further payment from the plaintiff after the last installment. Whether the money was paid in installments or once off payment what is clear is that the plaintiff did not make

a full payment as in the agreed facts. There is no explanation as to why the balance was not paid. The first defendant alleges repudiation and breach of contract by the plaintiff and asserts that one cannot then demand specific performance under those circumstances. Central to this agreement was full payment of the merx failure of which the contract becomes invalid on account of breach. The defendant affirms that he cancelled the agreement upon realizing the plaintiff had disappeared without fulfilling the full terms of the agreement.

The parties do not agree on the total amount paid and received but the agreed price was $25000 USD. Also, what is agreed is that the plaintiff did not pay the full price thought they both disagree on the total amount paid.

The first defendant raised the repudiation on the part of the plaintiff, the Oxford English dictionary defines repudiation as an act of claiming that something is invalid rooted in the latin word "*repudiare*" meaning to divorce or reject. The effect of this is to bring something to nullity.

The cases cited by the defendant are relevant in this case. ***Delta Corporation* v *Forward Wholesalers Private Limited and Anor* HH 53/17** *supra* clearly takes the position that where a party formally admits a fact in pleadings it becomes unnecessary for the other party to lead evidence on that. It is also incompetent for the same party to contradict it.

Also, the case of ***Pramadvara Appalraju and Anor* v *Pat Janza*** *supra*. The case also clearly states that the remedy for specific performance is only available to a party who has complied with his part of the contract. A party may not seek that remedy where he has not complied with part of the contract. And in the same case supra the court cited with approval, Wessels, *The Law Of Contract in South Africa* volume 11 where the learned author stated that," the court will not decree specific performance where the plaintiff has broken the contract or made a material default in the performance where he has failed to show that he has performed in terms of the contract. Also held in the case of ***IIsha Mining (Pvt) Ltd* v *YAKATA TRADING T/A VIKING HARDWARE DISTRIBUTERS* HB09/20.**

When a party to contract indicates to the other party either expressly or by conduct of its intention to renege, the innocent party is well within his entitled to treat himself discharged from further performance. Contact is deemed repudiated or abandoned.

In this particular instance there is nothing to show the plaintiff paid anything more than the three installments of $6000,7780 and $2400. The $20180 as on 29 October 2013 is not supported any were in this case.

What is therefore Is that the plaintiff did breach the material part of the agreement and in the process repudiated the agreement. It left the defendant with no option but to cancel the agreement. From 2013 nothing took place until 2016.There is no clear history as to now the letter of demand came about given the dormant period in between. The defendant put their case very well and in the absence of closing submissions from the plaintiff the defence case is very intact. Even if the plaintiff had put in their submissions nothing much was going to change as there was a clear breach of contract.

Conclusion

From the agreed facts and the circumstances of this matter the Court is convinced that the plaintiff was in breach and as such cannot succeed on the demand for specific performance. The plaintiff simply did not pay fully as required in the agreement and therefore cannot have his cake and eat it at the same time. On the issue of costs this court is not inclined to grant on an attorney-client scale.

In the end after perusing the papers filed before me and hearing counsels, it **is ordered that;**

The claim for specific performance be and is hereby dismissed and plaintiff to pay costs at an ordinary scale.

KATIYO J: .....

Gunje Legal Practice, plaintiff's legal practitioners
Saunyama Dondo, defendant's legal practitioners