

CLEMENT MARONGWE
versus
HARARE MUNICIPALITY
and
LOCAL AUTHORITIES PENSION FUND

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 19 June 2017

Opposed Matter

Mutema, for the applicant
R Zinhema, for the 1st respondent
Mutero, for the 2nd respondent

MUNANGATI-MANONGWA J: After working for the greater part of one's life an employee not only looks forward to taking a deserved rest from active employment but reasonably expects to receive their pension timeously and in full as prescribed by law.

This has not been the case for one Clement Marongwe the applicant herein. In pursuing payment of his pension, applicant has approached this court seeking the following relief against Harare Municipality and the Local Authorities Pension Fund.

- “1. Application for specific performance be and is hereby granted against both the 1st and 2nd Respondents.
2. The 1st and 2nd Respondents be and are hereby ordered to pay \$19 405.05 to the applicant, the one paying the other to be absolved.
3. The 1st and 2nd Respondents shall pay interest at the prescribed rate from 1st day of November 2014 the date being of initial default to date of full and final payment.
4. The 1st and 2nd Respondents shall pay costs of suit on an attorney client scale, the one paying the other to be absolved.
5. The 1st and 2nd Respondents be and are hereby ordered to pay the debt as in paragraph (2) of this order within 48 hours of this order into the trust account of Messrs Stansilous and Associates as shown by annexure ‘C’ of the application.”

The facts of the matter are as follows: The applicant was employed by the City of Harare up to his retirement age of 60. When he retired he received a letter from the second respondent which outlined his pension details consisting of what he was to get by way of a lump sum, accrued arrears and his monthly pension. The letter of 17 November 2015 made it clear that second respondent was having cash flow (problems) challenges and payment was to be paid as and when the Fund gets the requisite funds.

The second respondent failed to pay the funds for a full year, applicant then approached his legal practitioners with instructions to demand payment which was done through a letter dated 2 November 2016. In response second respondent reiterated that it had cash flow problems but it had on 2 November 2016 (the day applicant's lawyers wrote a letter) remitted US\$5 528 and were making arrangements to pay another US\$4000, they even apologised for the inconvenience. On 19 January 2017 applicant instituted this application for specific performance against his former employer and the pension fund. Both parties opposed. The first respondent's opposition centered on the fact that the obligation to pay the applicant lies on the second respondent who admitted liability, as such, 1st respondent is not part of the dispute. The second respondent on the other hand, averred that although first respondent deducted applicant's contributions from his remuneration, it did not forward payments to second respondent, consequently the second respondent is not liable for any payments to applicant until first respondent has paid it applicant's contributions. Second respondent denies that its letter of 17 November 2016 is an acknowledgment of debt. It was argued on second respondent's behalf that the promise to pay applicant a further US\$4000 during December 2016 arose out of an undertaking by first respondent to pay second respondent that amount towards applicant's account but it later reneged. No evidence of such an undertaking was placed before the court.

At the hearing, both respondents raised a point *in limine*, that there is a material dispute of fact. The dispute being that first respondent did not remit the deductions from applicant's salary to it. Further, that the first respondent has not controverted or addressed the issue of non-remittance of contributions coupled by the fact that the applicant has not tendered proof to show remittance of his contributions. It was submitted on behalf of the first respondent that there was a material dispute of fact relating to the manner in which a part payment was made to applicant by the second respondent and how the amount claimed was calculated. In that regard both the part

payment and the balance owing needed clarification as the process was done in first respondent's absence.

I find that there is no material dispute of fact requiring further evidence in this matter with regards to applicant's case. A material dispute of fact was defined by MAKARAU J (as she then was) in *Supa Plant Investments (Pvt) Ltd v Edgar Chidavaenzi*¹ as arising

“when such material facts put by the applicant are disputed and traversed by respondent in such a manner as to leave the court with no ready answer to the dispute between the parties in the absence of further evidence.”

Such is not the case herein. The court is in the clear. The applicant was an employee of first respondent, his contributions to the second respondent were duly deducted from his earnings without fail, he then retired, he was informed of the amount due to him as pension. All this is not in dispute. If there is a dispute at all, it is between first and second respondent as to what was remitted and none of the (two) 2 parties provided evidence on that. The first and second respondents' haggling over figures does not affect the applicant's case. Thus, the material dispute of fact alleged is perceived not real. For that reason, I dismiss the point *in limine*.

A party wishing to claim specific performance must satisfy the following requirements²

- a) Allege and prove terms of the contract
- b) Allege and prove compliance with any antecedent or reciprocal obligation or tender to perform it fully.
- c) Allege non-performance by defendant
- d) Claim specific performance

It is apparent from the evidence presented that there existed a tripartite contract between applicant, first and second respondent. The terms were such that applicant had to contribute to the pension fund run by the second respondent. This he had to do through first respondent whose obligation was to deduct the requisite monthly contribution from the applicant's salary and remit the amount to the second respondent. The second respondent's obligation was to then pay applicant's pension at applicant's retirement.

¹ HH92/09

² Amler's Precedent on Pleadings 8th Ed p127
Chiarelli v Bouna Investments (Pvt) Ltd HH678/15
Mufowo v Manyengera & Others (HH 266-17)

In order to comply with the terms of the contract, the applicant simply had to contribute to the fund and this was by way of deductions of the requisite amounts from his earnings. This was done, none of the respondents denies this. This was sufficient compliance on his part. After applicant complied with his obligation, the respondents have not performed their own side of the bargain. That being so, the applicant is within his rights to claim. As for the first respondent, it has failed to prove that it remitted whatever it collected to the second respondent in the face of an allegation that it did not remit all contributions. It was incumbent upon the first respondent to prove that it performed its obligation by deducting applicant's contributions and remitting same to the second respondent. It has failed to do so. For its part, the second respondent has not proven the total remittances to it by first respondent. Further, whilst it undertook to pay the applicant, the fact remains it did not pay him in full.

The second respondent's defence that it did not receive the full remittances is an afterthought and not proven. I am fortified in my decision by the fact that the second respondent on 17 November 2015 clearly acknowledged that they were to pay applicant his calculated pension once their finances improved. This was reiterated in a letter of 30 November 2016 which was accompanied by an apology. It was never mentioned that applicant's contributions were never remitted to second respondent. If anything, second respondent put the blame for the cash flow problems on failure by member local authorities to remit contributions, which to me is a general statement as no specific local authority is mentioned.

I will thus take it that in this tripartite contract only the applicant was able to fulfil his obligations. The applicant has also managed to prove non-performance by the two respondents. That being so, he has satisfied the requirement for specific performance and is therefore entitled to the relief he seeks. The two respondents are therefore liable for specific performance. If amongst the two, one failed to fulfil its obligation towards the other it then becomes an issue between them regarding who owes who how much. That has nothing to do with the applicant. As for the interest claimed since the date of retirement, I find nothing untoward as the amount arises out of a liquid claim, an acknowledged amount not damages which have to be determined by the court. In any event, the money was due to applicant as of the date of his retirement.

Accordingly the following order is granted.

1. The application for specific performance be and is hereby granted against both the first and second respondents.
2. The first and second respondents be and are hereby ordered to pay US\$19 405.05 to the applicant jointly and severally, the one paying the other to be absolved.
3. The first and second respondents shall pay interest at the prescribed rate calculated from the 1st November 2014 to date of full and final payment jointly and severally, the one paying the other to be absolved.
4. The first and second respondents shall pay costs of suit jointly and severally the one paying the other to be absolved.

Stansilous & Associates, applicant's legal practitioners