

THE GRANGE RESIDENTS ASSOCIATION
versus
PADLEY ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 24 February 2017 & 27 September 2017

CIVIL TRIAL

T R Mugabe, for plaintiff
T M Musekiwa, for defendant

TAGU J: The plaintiff is a common law universitas of the residents and ratepayers of a suburb called The Grange in the city of Harare. They came together as an association of residents who purchased residential stands from the defendant during the period extending from 2007 to date. The defendant is a property development company that purchased a 60 ha plot of land, subdivided it into numerous 2000 square metres stands and sold same to individuals. In terms of the various agreements of sale concluded by the defendant and its various clients, it was supposed to service the property development by way of providing roads, storm water reticulation and water work among others. The defendant breached the terms of the agreements and despite notice of the breach the defendant failed to rectify the breach. As a result the plaintiff instituted an action seeking specific performance and or alternatively payment of damages in lieu of specific performance.

At first the defendant denied liability for the specific performance prayed for by the plaintiff until November 2015 when, and at a Pre-Trial Conference before Honourable CHIGUMBA J the parties entered a Deed of Settlement and signed off on an Order by Consent in the following terms:

- “1. The Defendant is unconditionally liable for specific performance to the Plaintiff and its membership by way of the development, servicing and attendant works at Sub Division C of the Grange in terms of the agreements of sale made and entered into by the parties or alternatively to pay, in damages in lieu of Defendant’s performance, the objective value of performance in money equivalent to the costs of specific performance aforementioned by a mutually agreed third party;
2. The Defendant unconditionally elects to pay damages in lieu of specific performance;
3. The issues of the quantum of damages in lieu of specific performance and the liability for costs of this action are referred to trial.”

At the trial this court was being called upon to determine the quantum of damages in lieu of specific performance by the defendant for the development, servicing and attendant works at the aforementioned piece of land.

In order to prove the quantum of damages the plaintiff led evidence from one witness a Mr Stanly Nyevere, a committee member of the plaintiff. After narrating what the defendant was supposed to do, Mr Stanley Nyevere produced five quotations from different contractors for the servicing of the subdivision as part of its bundle of documents. The defendant did not object to the production of the documents which can be summarised as follows:

- a) Storm Property Developers- \$571 110.66;
- b) Clockmate Investments Civil and Building Contractors- \$722 454.98;
- c) Tencraft Construction Civil Engineering- \$506 748.32;
- d) Bitumen Construction Services- \$830 284.32 and
- e) Tensor Systems- \$781 449.47.

The witness did not choose any one of the quotations but left it to the court to grant what it perceives as a reasonable quotation.

In its defence the defendant did not deny liability but asked the court to come up with a justifiable, affordable and fair amount in the determination of damages. However, in its opening address to the court the defendant indicated that it is prepared to render specific performance in place of payment of damages in pursuance of its out of court agreement.

The defendant also led evidence from one witness a Mr Marshal Zvikomborero Jonga who is the Chief Operating Officer of Native Investments Africa Group which is the Holding Company of the defendant. He too narrated what he thought his company was supposed to do. The defendant through this witness offered to settle on the Storm Property Developers

quotation “exhibit 8” for an amount of \$242 645.22. This was disputed by the plaintiff because the quotation produced by the defendant differed to the quotation by the same company given to the plaintiff for the same work.

THE LAW

The object of damages is to place the innocent party in the position he would have been had the contract been performed so far as that can be done by the payment of money. See *Victoria Falls and Transvaal Power Co. Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 122. In the present case the issue that fell for determination by this court is the quantum of damages. The court was not called to determine specific performance of the agreements as this was settled at the Pre-Trial Conference.

However, the defendant submitted that it is an established principle of our law that where a contract has been breached the innocent party is not entitled to sit back and allow damages to multiply. It submitted that the plaintiff had a duty to mitigate its damages as soon as it became aware of the breach. (See *Versfeld v SA Citrus Farm Ltd* 1930 AD 452 at 454). In this case the defendant argued that some of the residential stands were purchased during the Zimbabwean dollar era and the engaged contractor Bitumen Construction Services failed to complete the initial works due to the escalating costs arising from hyper-inflation obtaining at the time but the plaintiff is now relying on an order by CHIGUMBA J made in November 2015.

In my view this is a sound argument but the bottom line is that the order by CHIGUMBA J was based on a Deed of settlement entered into by and between the plaintiff and the defendant. So the court is duty bound to determine the quantum of damages in lieu of specific performance as the sole issue referred for trial.

The plaintiff prayed that the court should award damages in lieu of specific performance in an amount of US\$805 866.92 basing on the average prices supplied by Bitumen Construction Services and Tensor Systems. The defendant opted to pay an amount of \$242 000.00 as shown on exhibit 8 a quotation supplied by Storm Property Developers. It is however, difficult to understand why the same contractor Storm Property Developers gave the parties two different quotations for the same job. It gave the plaintiff a higher quotation while giving the defendant a lower quotation. The court will make an assessment of and appropriate, fair affordable and reasonable amount of damages basing on the quotations supplied by both the plaintiff and the defendant. There being no hard and fast formula for the determinations of an appropriate amount of damages other than to look at the various quotations, the court found it prudent to

add all the six quotations and divide the total by six to get an average amount of damages. The total value of the quotations came to US\$3 654 692.97. If I divide this amount by six we get US\$609 115.50. In my view this is a fair amount of damages.

In the result I make the following order

IT IS ORDERED THAT

- a) The defendant shall pay to the plaintiff US\$609 115.50 as damages in lieu of specific performance on or before 31 December 2017, and
- b) In the event of default the Defendant's property wherever situate be and is hereby declared executable and the Sheriff is authorised to dispose of the same to satisfy the damages.
- c) The Defendant pays the plaintiff's cost on an attorney client scale.

Nyakutombwa/Mugabe Legal Counsel, plaintiff's legal practitioners
Matipano & Matimba, defendant's legal practitioners